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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als., Appellants,*

v.

RICHARD SINCOCK, *et als.*

On Appeal from the United States District Court for the District of Delaware

APPELLANTS' REPLY BRIEF

This reply brief enables us to develop more fully than was possible earlier significant materials bearing on the proper interpretation of the Equal Protection Clause. It also permits us to draw attention to such of the assertions made by Sincock *et als.* and by the Solicitor General as seem most imperatively in need of immediate correction.[1]

[1] We use the following additional designations:

"Del. Br." refers to our brief in chief.

"Pl. Br." refers to the brief of Sincock *et als.*

"Pl. App." refers to the record appendix printed by Sincock *et als.*

"U.S. Br. *A.C.*," without more refers to the brief *amicus curiae* filed on behalf of the United States in the present case.

"U.S. Br. *A.C.*," followed by a number, refers to the brief *amicus curiae* on behalf of the United States in the other State reapportionment cases so numbered.

Of course we shall strike only at the essentials; the present cause is too momentous for debating points, even if we had the time to make them.

The pages that follow will accordingly concentrate on the two most serious and basic errors of our opponents.

The first of these is the all-out effort of Sincock *et als.*, joined by the United States as *amicus curiae*, to read into the five words "equal protection of the laws" personal preferences, postulates for constructing governments, and blueprints for the distribution of political power within a community, that not only cannot be found in those words, that not only lack support in those words, but that represent precisely the contrary of what those who penned those words nearly a century ago said publicly that the words meant.

There are, of course, vast areas of constitutional law where our experiences and evolution over more than 170 years have given to the several clauses of the Constitution meanings that the Framers could not possibly have foreseen.

As Mr. Justice Holmes said for the Court in *Missouri* v. *Holland*, 252 U.S. 416, 433,

> "* * * when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."

Nevertheless, in no situation of which we are aware, has there ever been a decision where, without the injection of

new factors, this Court has ever construed any part of the Constitution to mean just precisely the opposite of what its framers intended. Even in *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, where the Minnesota mortgage moratorium law was sustained under the Contract Clause, the Court was at pains to note the additional factors that had been injected into what had earlier been the narrow question of the impairment of a private contract. Chief Justice Hughes said (p. 442)

> "Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends."

Here, however, we are dealing with the distribution of political power within a State. In that area there are no new factors; all of the relevant elements—town against country, older communities against newer settlements, the few against the many, the rich against the unpropertied—every one of those competing factors within a political unit is as old as America itself.

Consequently, when our opponents urge the Court to find in the Equal Protection Clause the precise opposite of what its draftsmen said it contained, and to effect such a drastic reversal virtually as an original proposition, after an interval of nearly a century during which the issue was never deemed capable of judicial determination, they are asking the Court to sit, not as a super-legislature nor even as Council of Revision, but as "a Convention for proposing Amendments" (U.S. Const., Art. V) which shall be empowered not simply to propose but actually to effect the most drastic amendments, not gradually, not in the light

of long judicial experience, but suddenly and radically and with an effect that very substantially curtails, for the first time, the powers of the several States over the structure of their own governments.

We content ourselves with saying that there is, happily, no precedent for such action.

The second basic error of our opponents is that they ask the Court to take this drastic step, and to strike down the 1963 amendment to the Delaware Constitution as violative of the refinements that they are reading as constitutional absolutes into the Equal Protection Clause, in a literal vacuum—for, as the briefs of Sincock *et als.* and of the United States show, its counsel have never stopped or troubled to examine the proceedings of the Committee that formulated the 1963 amendments (Def. Ex. 1, Del. App. 100a-339a).

We had supposed that, in examining any plan for apportionment or reapportionment to determine whether (*Baker* v. *Carr*, 369 U.S. 186, 226) "a discrimination reflects *no* policy, but simply arbitrary and capricious action," the first prerequisite would be to review the reasons for such plan, and that in the absence of such a review it would be arbitrary and capricious to denounce a particular result as arbitrary and capricious simply because it did not meet the examiners' preferences.

Yet our opponents have done precisely that. They assail the plan contained in the 1963 amendment to the Delaware Constitution, but without examining in even the most cursory fashion the reasons, the carefully and precisely articulated reasons, that underlie its provisions. Their approach presents, we fear, what in this delicate area of the relationship of the States to the Nation can only be characterized as a rather terrifying example of "Don't bother me with facts, I have already made up my mind."

Otherwise stated, our opponents condemn the 1963 Delaware amendment under the Equal Protection Clause, by closing their eyes to what is contained in the first, and by seeing in the second what never was there.

The major headings below follow those of our brief in chief; the subheadings vary from those earlier presented.

I. THE FEDERAL ANALOGY OF AREA REPRESENTATION IN THE SENATE OF THE UNITED STATES IS FULLY AND EXACTLY APPLICABLE IN DELAWARE, WHERE COUNTIES WERE NEVER CREATURES OF THE STATE, BUT WHERE, TO THE CONTRARY, THE STATE WAS CREATED IN SEPTEMBER 1776 BY THE THEN EXISTING SOVEREIGN THREE LOWER COUNTIES

Neither Sincock *et als.* nor the United States question our detailed recital of the process whereby the Three Lower Counties upon Delaware became "The Delaware State." They differ only as to the inferences to be drawn from the Delaware history we have recited, and both argue primarily that the Federal analogy that we have invoked is actually not analogous.

First. Sincock *et als.* assert (Pl. Br. 39-40) that the Three Lower Counties were always united until the State was formed, and constituted a unitary government. That they called themselves a "Government" and a "Colony" (Del. Br. 44-45) is clear, but after June 15, 1776, when they threw off the royal yoke and with it the Proprietor who represented the Crown, they were linked together only in an Assembly—and that link was a tenuous one indeed, for no less an authority than Lord Mansfield had ruled (Del. Br. 37-39) that "their Legislative Authority * * * will not yet bear a strickt Examination."

Consequently, when independence came, each of the Three Lower Counties was sovereign, a point on which

the experts for both sides agreed at the trial (Mr. deValinger, Del. App. 28a; Prof. Hanson, Tr. 287, quoted at Del. Br. 48, note 8).[2] True, they were joined in a loose confederacy, but the terms of the compact were plainly far less formal and precise than those that bound the United States of America under the Articles of Confederation (Del. Br. 48-49, 51); and if the United States could in 1787 properly effect compromises in the terms of their representation in the legislature of the new union after having been independent and loosely allied since 1776, so the Three Lower Counties could treat with each other as sovereigns when they formed The Delaware State—even though in the latter situation their unlimited sovereignty lasted only three months and not thirteen years.

Second. But, it is argued (Pl. Br. 38, 42-43; U.S. Br., *A.C.*, 52, note 25), whatever may have been the case originally, the counties of Delaware after September 1776 lost their sovereignty, and have had their governmental powers whittled down over the years. Hence, it is contended, there is now no basis for giving to each county equal representation in the Delaware Senate.

We think the obvious answer is that, just as "The Great Compromise" of the Federal Convention arrived at in 1787, when there were only thirteen small States on the Atlantic seaboard, was given renewed effect only a very few years ago, when Alaska with its minuscule population was admitted on an equality with New York and California and all the rest, so the arrangements of the Convention of the Delaware State of 1776 (Del. Br. 44-47), when the Three Lower Counties merged their sovereignty into that of the new State, could and should be given effect today to sustain equal county representation in the Delaware senate.

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[2] The quotation from Mr. deValinger's testimony (Del. App. 21a) that Sincock *et als.* set forth at Pl. Br. 41, note 15, does not bear on this issue.

True, as the United States says (U.S. Br., *A.C.*, 52, note 25), "The equality of representation by States in the United States Senate recognized that the new government was in part a construction of the old confederation of sovereign States." That is why the Great Compromise prevailed. But Alaska, which plainly was not able to threaten to walk out (as one of Delaware's delegates did in 1787, see Sen. Sumner's speech quoted at Del. Br. 120-121)—Alaska, the least populous of all, whose voice in the Senate of the United States dilutes by a ratio of 74 to 1 the voting force of any citizen who lives in New York or California (Del. Br. 91), was admitted as a State in 1959. And, when admitted, the erstwhile Territory, an area that had no independent sovereignty (cf. *Grafton* v. *United States*, 206 U.S. 333, 354-355), that had only a voteless Delegate in the House, and that was subject to the unconsented regulation of Federal officers (*Metlakatla Indians* v. *Egan*, 369 U.S. 45), became the largest state in area but the smallest in population—and still obtained the two Senators agreed upon by the Framers in 1787.

There is, accordingly, just as much reason for county sovereignty in Delaware in 1776 to carry through in 1963 as there was for State sovereignty under the Articles of Confederation in 1787 to carry through in 1959 and 1960.

Third. Sincock *et als.* contend, however, that (Pl. Br. 43) there is no analogy, and the Solicitor General speaks (U.S. Br., *A.C.*, 30) of "the obviously false analogy to the United States Senate," because, he says, the Delaware House is not apportioned according to population, and because Delaware's Senators do not represent any one county at large—as indeed they did through 1897, see Del. Br. 16—but instead represent merely districts within the several counties (U.S. Br., *A.C.*, 13-14, 49-50). Hence, it is said (U.S. Br., *A.C.*, 13), "The Delaware legislature is constituted upon a radically different basis from the fed-

eral Congress, and the apportionment results in gross discrimination that the federal system has never created."

These objections are demonstrably untenable.

To begin with, the purpose of the framers of the 1963 amendment to the Delaware Constitution was to make the reapportionment of the House conform to population, see Point III, *infra*, a purpose impossible of attainment because of the time pressure imposed by the court below, but a purpose which the proposal of the Bipartisan Committee's second report would have effectuated (Del. Br. 107-108; see the Appendix hereto, *infra*, pp. 68 *et seq.*

Next, up to now no member of the court below or anyone else so far as we are aware has ever suggested that it is a prerequisite to a State's adoption of the Federal pattern for its legislature that each member of its upper house represent a political subdivision at large rather than a portion of that subdivision.

We had supposed that the principal objection to the apportionment of the Delaware Senate effected in 1963 was that, again because of the pressure of time, the existing Senatorial districts had been continued. That was also the view of the Bipartisan Committee, which reported a bill to equalize the Senatorial Districts in each County, a bill that passed the Senate unanimously on the very day that the Circuit Justice stayed the injunction theretofore issued in this case (Del. Br. 107-108; Point IV, *infra*, pp. 58-59); for the text, see the Appendix hereto, *infra*, pp. 68 *et seq.*).

Finally, the Solicitor General's assertion (U.S. Br., *A.C.*, 13) that Delaware's 1963 apportionment results in gross discrimination that the federal system has never created, is simply contrary to the fact: The disproportion under the 1960 census between New Castle County as against Sussex County and Kent County in the Delaware Senate

is, respectively, 4.2:1 and 4.68:1, whereas the disproportion between the four least populous States as against New York in the Senate of the United States under the same census is 74:1 for Alaska, 58:1 for Nevada, 50:1 for Wyoming, and 43:1 for Vermont. See Del. Br. 91 and the qualification there noted in footnote 16.

Fourth. It is argued by the United States (U.S. Br., *A.C.*, 13-14) that the question of the Federal analogy is not raised by the decree of the district court, "which merely adjudicates the unconstitutionality of the present apportionment," and (*id.*, 58) that while the district court "indicated guidelines for testing the constitutionality of a State legislature apportionment in its opinion, they are not part of the order."

Sincock *et als.* also argued, in their Brief in Support of the Motion to Affirm (pp. 2, 12-13, 14-18, 22), that the issue of the Federal analogy was not in the case, a contention that was dealt with at some length in our opposition to that motion.

But perhaps a few words will suffice to explain why the issue of the Federal analogy is still inescapably in this case, assuming the soundness of the holding below that the 1963 apportionment is invalid.

1. The legislature might have equalized the Senatorial Districts within each county, as it started to do (Del. App. 107-108; Appendix, *infra*, pp. 69-74).

2. The legislature might have followed the Solicitor General's suggestion that the Federal analogy is applicable only when the Counties as a whole are represented, and have provided for the election of the seven senators at large within each county.

Unless it can be said with assurance that either of those plans would have satisfied the district court, assurance that all too plainly no one who has read the opinions be-

low (J.S. App. A16-A67) can give, the question of the Federal analogy permeates this case, and any assertion to the contrary is simply unreal and indeed inaccurate verbalization.

The basic question for decision, accordingly, is whether anything in the Equal Protection Clause forbids a State from patterning its legislature on the Federal model. To that we turn.

II. ADOPTION BY A STATE OF THE FEDERAL PLAN FOR THE COMPOSITION OF ITS LEGISLATURE, WHEREBY ONE HOUSE IS APPORTIONED BY POLITICAL SUBDIVISIONS RATHER THAN BY POPULATION, DOES NOT NOW, AND AS DEMONSTRATED BY CONTEMPORANEOUS LEGISLATION NEVER DID, VIOLATE THE EQUAL PROTECTION CLAUSE

A. Florida was readmitted notwithstanding objection based on the circumstance that her 1868 Constitution favored sparsely-settled counties over populous ones.

In its brief here, the United States asserts (U.S. Br., *A.C.*, 52-53):

> "Congress did not even advert to the problem of apportionment in readmitting the Southern States. For, at that time, unlike at the time of the adoption of the original Constitution and again during the last few decades, apportionment was not an issue of major importance. There is no way to know whether, if the issue had been squarely posed, Congress would have considered that the equal protection clause applied to apportionment of State legislatures at all and, if it did, what standards were appropriate."

And, further (U.S. Br., *A.C.*, 54):

> "At most, the history shows that some deviations from *per capita* representation in the readmitted States provoked no objections. There is no evidence that Congress knew of them; nor that it knew whether they were large or small."

Similarly, Sincock *et als.* assert (Pl. Br. 58):

> "If an inferred contemporaneous construction of equal protection yields anything, it provides more support to the idea of equality of persons in representation than to the assumption that it somehow condoned malapportionment."

The fact, the easily demonstrable fact, is otherwise. There was specific objection to the readmission of Florida on the ground that its 1868 Constitution gave control of the Florida legislature to its sparsely settled counties, and this objection failed, so that Florida was readmitted notwithstanding.

We pointed out in our brief in chief (Del. Br. 59-60) that although the discrepancy in voter strength between the several Florida counties under Art. XIV of that State's 1868 Constitution was on the order of 73.7 to 1, the only question raised in the Senate when Florida's new Senators presented themselves was whether Florida had complied with the condition imposed on its readmission by "adopting" rather than "ratifying" the Fourteenth Amendment.

We also pointed out (Del. Br. 115, 121-122) that the Senate had added Florida to the list of States eligible for readmission and that the House after some discussion had concurred in that and other Senate amendments. We failed, however, to note the significant exchange that follows.

When the Senate version was returned to the House for concurrence in its amendments, Mr. Farnsworth of Illinois moved to strike out Florida (Cong. Globe, 40th Cong., 2d sess., p. 3090). He said (pp. 3090-3091):

> "I am thoroughly convinced that Florida ought not to be readmitted to representation in Congress with its present constitution.
>
> * * * * * *
>
> "There are many other things of which, if I had time, I would like to speak. I might refer to the appor-

tionment of representatives. By this constitution representatives in the legislature of Florida are apportioned in such a manner as to give to the sparsely-populated portions of the State the control of the Legislature. The sparsely populated parts of the State are those where they are very few negroes, the parts inhabited by the white rebels, the men who, moving in from Georgia, Alabama, and other States, control the fortunes of their several counties. By this constitution every county in that State is entitled to a representative. There are in that State counties that have not thirty registered voters; yet, under this constitution, every one of those counties is entitled to a representative in the Legislature; while the populous counties are entitled to only one representative each, with an additional representative for every thousand inhabitants."

Mr. Butler of Massachusetts, in reply to this and other objections, answered as follows (p. 3092):

"All these arguments, all these statements, all the provisions of this constitution have been submitted to the Judiciary Committee of the Senate, and they have found the constitution republican and proper. This constitution has been submitted to the Senate, and they have found it republican and proper. It has been submitted to your own Committee on Reconstruction, and they have found it republican and proper, and have reported it to this House."

On a vote (p. 3097), the amendment to strike out Florida from the bill lost by 45 to 99, with 45 not voting; the Nays on this proposition included such architects of Reconstruction as Mr. Butler of Massachusetts, Mr. Bingham of Ohio, and Mr. Thaddeus Stevens of Pennsylvania. None of these, very obviously, considered the malapportionment of which Mr. Farnsworth had complained to constitute a denial by Florida of the equal protection of the laws to the citizens of its more populous counties, in violation of the Fourteenth Amendment that Florida had so

solemnly "adopted" as a prerequisite to readmission into the Union.

This vote is even more significant in the present connection by reason of the circumstance that it was Mr. Bingham who actually wrote the Equal Protection Clause—indeed, he drafted all of the second sentence of Section 1 of the Fourteenth Amendment in precisely its present language. See Point IIC, pp. 24-36, *infra*.

What this Court said in *United States* v. *Florida*, 363 U.S. 121, of this very Florida Constitution bears repetition (pp. 125-127; footnotes omitted):

> "The Government argues, however, that these readmission enactments did not contemplate and Congress did not make a general scrutiny of all the provisions of the state constitutions, but only that the constitutions had been duly adopted and were republican in form. The Government makes many references to debates which indicated that some Senators and Congressmen were satisfied with such a limited examination of the constitutions. Florida, on the other hand, points out many other remarks which indicated a much closer examination of the state constitutions.
>
> "It is beyond doubt that the proposed constitutions were printed, then read, discussed, and amended in the Congress. For instance, the very 1868 bill that admitted Florida's congressional representatives contained a proviso rejecting certain parts of the Georgia Constitution. That at least some Congressmen scrutinized the constitutions to see if amendments were necessary is persuasively shown by the remarks of Congressman Thaddeus Stevens, set out below. Mr. Stevens was Chairman of the all-important Joint Committee on Reconstruction, and, because of his leading role as architect of the reconstruction plan finally adopted and carried out by Congress, has appropriately been called 'the Father of the Reconstruction'.
>
> "The voluminous references to the Reconstruction debates fail to show us precisely how closely the Southern States' Reconstruction Constitutions were ex-

amined. We cannot know, for sure, whether all or any of the Congressmen or Senators gave special attention to Florida's boundary description. We are sure, however, that this constitution was examined and approved as a whole * * *.

Language to the contrary is quoted at Pl. Br. 47-48, note 18. But, although Sincock *et als.* do not disclose the fact, they are there quoting from the dissenting opinion in *United States* v. *Florida*, 363 U.S. 121, 136 *et seq.*

In this connection, also, we cannot forbear to remark that since we are dealing with what the 40th Congress did, and said and knew and had available to it, there can be no possible basis for judging the deeds of that Congress, as the brief of the United States does, on the basis of the 1870 census, simply (U.S. Br., *A.C.*, 55) "because the Civil War caused significant relocation of population." The legislators of 1868, however wise and foresighted we may now consider them, had available to them only the figures of the 1860 census; their eyes could not pierce the veil of the future.

B. The decision below in this case disregards the central holding of Baker v. Carr, namely, that any plan of apportionment with a rational basis satisfies the Equal Protection Clause regardless of a court's personal preferences for a different plan.

We turn to the core of this Court's holding in *Baker* v. *Carr*, which is this (369 U.S. 186, 226):

> "Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."

Accordingly, the problem is to ascertain from the decisions of this Court just what are the "well developed and familiar" standards for applying the Equal Protection Clause.

First. Two clauses in Section 1 of the Fourteenth Amendment, the Due Process Clause and the Equal Protection Clause, have received differing answers over the years. Both clauses are vague, no doubt of convenient vagueness, as befits constitutional commands general in terms. Their very generality has evoked opposite judicial responses.

One such response, similar in cases involving both clauses, has involved reading into "due process of law" as well as into "equal protection of the laws" a rigidly circumscribed meaning that turned the courts into super-legislatures. The other response, again found in cases construing both clauses, has left responsibility for unwise or ill-considered legislation with the legislatures, holding unconstitutional only those measures that very plainly transgressed constitutional limitations.

The first approach, initially reflected in Mr. Justice Field's dissent in the *Slaughter-House Cases*, 16 Wall. 36, 83, reached its first apogee in *Allgeyer v. Louisiana*, 165 U.S. 578, where Mr. Justice Peckham spoke for the Court, and, preeminently, in the ill-fated bakeshop case, *Lochner v. New York*, 198 U.S. 45, where, once again, Mr. Justice Peckham spoke for the majority. Following a period of dormancy, this view attained a new flowering in the 1920s and early 1930s, reaching a second but shortlived climax in *Morehead* v. *Tipaldo*, 298 U.S. 587.

The second approach was originally that of Mr. Justice Miller in the *Slaughter-House Cases* and of Chief Justice Waite in *Munn* v. *Illinois*, 94 U.S. 113. Thereafter its exponent was Mr. Justice Holmes, and his views, at least more often than not, prevailed until about 1921. Later still, the Field-Peckham doctrine assumed the ascendancy once

more, and this second view was then reflected only in dissents, notably by Mr. Justice Holmes and Mr. Justice Brandeis.

Finally, with *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, the tide turned, let us hope for the last time, so that the Holmes-Brandeis views are now the law of this Court and the law of the Constitution. The recent reaffirmation of this change in constitutional climate has been so recently reviewed in *Ferguson* v. *Skrupa*, 372 U.S. 726, that detailed documentation is unnecessary. But the interpretation placed on the Equal Protection Clause by the court below in this case, an interpretation so very different from that expounded by the most distinguished adherents of what has now become the prevailing view, suggests the appropriateness of recalling what those judges—and others—have said, so that we may have before us the "well developed and familiar" "[j]udicial standards under the Equal Protection Clause" that are at the very heart of *Baker* v. *Carr*, 369 U.S. 186, 226.

Four such standards are reflected in the opinions of those whose constitutional views of the Fourteenth Amendment have now prevailed.

First—and foremost—is the admonition that the constitutional limitations imposed by that Amendment are neither coextensive with nor to be measured by a court's own policy preferences.

The first opinion that Mr. Justice Holmes wrote for this Court involved the Equal Protection Clause. What he said then is apposite—startlingly apposite—for the problem now presented for decision. Here are his words on that occasion (*Otis* v. *Parker*, 187 U.S. 606, 608-609):

> "But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of

> morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this Court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*"

And, a little later, again speaking for the Court in an Equal Protection Clause case, he voiced another caution that also has application here (*Missouri, K. & T. R. Co.* v. *May*, 194 U.S. 267, 270):

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

For a time, as we have noted, these views were the views of the Court. Thus, in *McLean* v. *Arkansas*, 211 U.S. 539, 547, an Equal Protection Clause case, Mr. Justice Day said this for the Court:

> "The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

Again, in a Due Process case from the same volume of reports, Mr. Justice Moody in a celebrated case said for the Court (*Twining* v. *New Jersey*, 211 U.S. 78, 106):

> "In approaching such a question [i.e., of due process of law] it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people, through their appointed

> servants, to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that, in our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power."

Shortly thereafter, in one of his most celebrated expositions of the proper limits of the Due Process Clause, Mr. Justice Holmes, speaking for the Court, said (*Noble State Bank* v. *Haskell*, 219 U.S. 104, 110):

> "In answering that question [i.e., whether the statute deprives the plaintiff of property without due process of law], we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power."

Just prior to the First World War, as we have pointed out, Mr. Justice Holmes' views of the Fourteenth Amendment won acceptance from all of his brethren. Thus, in March 1916, Mr. Justice McKenna, speaking for a unanimous Court in an Equal Protection case, said this (*Tanner* v. *Little*, 240 U.S. 369, 385):

> "As to what extent legislation should interfere in affairs political philosophers have disputed and always will dispute. It is not in our province to engage on either side, nor to pronounce anticipatory judg-

ments. We must wait for the instance. Our present duty is to pass on the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature."

A few years later, the climate of constitutional opinion changed sharply, and views such as the foregoing found expression only in dissenting opinions. Here are two dissents by Mr. Justice Holmes written in the Nineteen Twenties, the first from a case involving the Equal Protection Clause, the second from one turning on the Due Process Clause.

> "If the 14th Amendment were now before us for the first time I should think that it ought to be construed more narrowly than it has been construed in the past. But, even now, it seems to me not too late to urge that in dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate." *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 241.

> "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain." *Tyson & Bro.* v. *Banton*, 273 U.S. 418, 446.

There are those who assert that since all of the foregoing passages dealt with social and economic legislation, the principles therein expounded have no application here, where "Civil Rights" (M/A 20) and "civil liberties" (U.S. Br., *A.C.*, No. 29, p. 66) are involved. We have already (Del. Br. 83-87) dealt with the fallacies of that argument. But we think it well to recall another observa-

tion by Mr. Justice Holmes, speaking for the Court, that pinpoints our opponents' basic error (*American Bank & Trust Co.* v. *Federal Reserve Bank*, 256 U.S. 350, 358):

> "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified."

The *second* standard for proper construction of the Fourteenth Amendment is that its generalized commands should not be interpreted so as to halt experiments by the several States. Here the controlling passages are in dissent, from the period of the Nineteen Twenties and early Nineteen Thirties when the Field-Peckham philosophy temporarily held sway.

Dissenting in *Truax* v. *Corrigan*, 257 U.S. 312, an Equal Protection case decided in 1921, Mr. Justice Holmes said (pp. 342, 344):

> "The dangers of a delusive exactness in the application of the 14th Amendment have been adverted to before now. * * * Delusive exactness is a source of fallacy throughout the law.
>
> * * * * *
>
> "There is nothing that I more deprecate than use of the 14th Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

In 1932, after Mr. Justice Holmes retired, the Court decided *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, a Due Process case. Mr. Justice Brandeis' dissent to that decision has become a classic of the law. We set forth its concluding paragraph (285 U.S. at 311), here, because it

so precisely points up just what it is that the court below in this case has done:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. * * * But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

The *third* principle is that the Fourteenth Amendment is not to be construed so as to overturn what has been long settled; on that point we have, initially, opinions of the Court by Mr. Justice Holmes, the first in a Due Process case, the second in one construing the Equal Protection Clause.

> "Again, we cannot wholly neglect the long settled law and common understanding of a particular state in considering the plaintiff's rights. 'We are bound to be very cautious in coming to the conclusion that the 14th Amendment has upset what thus has been established and accepted for a long time.'" *Otis Co.* v. *Ludlow Mfg. Co.*, 201 U.S. 140, 154.

> "If the 14th Amendment is not to be a greater hamper upon the established practices of the states in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that Amendment was passed." *Interstate Consol. St. R. Co.* v. *Massachusetts*, 207 U.S. 79, 87.

Acquiescence is particularly significant in matters involving the exercise of political rights—here, the right of a State to construct its legislature on the Federal pattern, a practice that goes back before the Federal Constitution itself. New Jersey, for instance, has had a bicameral legislature with an upper house apportioned on a county basis since 1776. See brief of N.J and 13 other States, No. 29, p. 4. That being so, what Chief Justice Hughes said for the court in *Smiley* v. *Holm*, 285 U.S. 355, 369, takes on added significance here:

> "General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny."

Indeed, both views expressed in *Snowden* v. *Hughes*, 321 U.S. 1, negative completely the notion, explicit in the holding below, that the Equal Protection Clause now suddenly prohibits a State from modeling the structure of its legislature on the Federal pattern.

Chief Justice Stone, for the Court, said (321 U.S. at 11):

> "Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. * * * But the necessity of a showing of purposeful discrimination is no less in a case involving political rights than in any other. It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern."

The dissenting justices (Douglas and Murphy, JJ.) said (321 U.S. at 17-18):

> "I agree that the equal protection clause of the Fourteenth Amendment should not be distorted to make the federal courts the supervisor of the state elections.

> That would place the federal judiciary in a position 'to supervise and review the political administration of a state government by its own officials and through its own courts' (*Wilson* v. *North Carolina*, 169 U.S. 586, 596)—matters on which each State has the final say."

We recur to the seminal passage in *Baker* v. *Carr*, 369 U.S. 186, 226, with which we began;

> "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."

Tested by those standards as they have been interpreted by our wisest judges over the years, there is nothing in the Equal Protection Clause that forever calcifies into rigid and immutable constitutional commands the "principles" and the "postulates" representing personalized utopias for ideal political structures that were presented to this Court in the course of the arguments in the other State reapportionment cases last month.

Certainly there is nothing in the Equal Protection Clause that supplies the "basic principles" that are expounded on behalf of the United States in this case (U.S. Br., *A.C.*, 32-43) and that were argued as well in the other State reapportionment cases last month. Refinements on that order represent considerations of desirability and reflect preferences that can only be read into the Equal Protection Clause. They are not commands that can be found there.

Those who urge the Court to write such preferences into the Equal Protection Clause as constitutional absolutes are not only asking that the standards just reviewed be jettisoned and abandoned, they are asking that the Court regress to the now rejected approaches of its most tragic era, some of which have just been catalogued only to be newly rejected in *Ferguson* v. *Skrupa*, 372 U.S. 726.

C. The very words of the Constitution caution against resting too elaborate a structure of voting rights on the Equal Protection Clause

Much has been read into the five words, "equal protection of the laws," in the briefs filed against us in this case, as well as in the briefs supporting broad plans for reapportioning in the other State cases. Very plainly, the cause of action in this and in the other reapportionment cases is based upon the Equal Protection Clause. *Baker* v. *Carr*, 369 U.S. 186, 237. But, up to now at any rate, there has been little if any study of that Clause with a view to ascertaining how far it can support the burden that the arguments of our opponents seek to build upon it.

In the course of the arguments in the other State reapportionment cases last month, one member of the Court asked, in substance, "Has the Equal Protection Clause anything to do with voting rights at all?" That question was never answered directly. Accordingly, we shall supply an answer now.

First. The legislative history of the Fourteenth Amendment shows rather plainly that it was not intended to grant either any right of suffrage nor indeed to affect the right of suffrage in any way.

The principal author of what is now the Fourteenth Amendment was Congressman John A. Bingham of Ohio (Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 30), whose amendment in the nature of a substitute was couched in terms that are now found word for word in Section 1 of the Fourteenth Amendment (*id.* at 42-43):

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Yet Mr. Bingham said specifically that Congress could not under that provision regulate suffrage in the several States (Cong. Globe, 39th Cong., 1st sess., pp. 2542-2543; italics added):

"* * * The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that has been taught to your committee and taught to all the people of this country by the history of the past four years of terrible conflict. * * * There was a want hitherto, and there remains a want now, in the Constitution of our country which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do and have never even attempted to do, that is to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every citizen within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State. Allow me, Mr. Speaker, in passing to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right under the forms of law or otherwise to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic although many of them have assumed and exercised the power and that without remedy. *The amendment does not give as the second section shows the power to Congress of regulating suffrage in the several States.*

"*The second section excludes the conclusion that by the first section suffrage is subjected to congressional law;* save indeed with this exception that as the right of the people in each State to a republican government and to choose their representatives in Congress is of the guarantees of the Constitution by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government and thereby deny suffrage to the people. * * * That great want of the citizen and stranger,

protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent it hath, no more; and let the gentlemen answer to God and their country who oppose its incorporation into the organic law of the land."

And in the Senate, Senator Howard of Michigan said the same thing (p. 2766):

"But, sir, the first section of the proposed amendment does not give * * * the right of voting. The right of suffrage * * * is merely the creature of law. It [is] * * * not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves * * *."

Second. The earliest judicial interpretations of the Equal Protection Clause emphasize its narrow scope. Thus, in the *Slaughter-House Cases*, 16 Wall. 36, Mr. Justice Miller said this for the Court (p. 81):

"In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of law in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

"If, however, the states did not conform their laws to its requirements, then by the 5th section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its

> power or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and we do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the Amendment."

So, in *Strauder* v. *West Virginia*, 100 U.S. 303, holding invalid under the Equal Protection Clause the trial of a Negro pursuant to a State statute rendering Negroes ineligible for jury duty, this Court said, speaking through Mr. Justice Strong (pp. 306-308):

> "This is one of a series of constitutional provisions having a common purpose, namely: securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the Amendments, as we said in the *Slaughter-House Cases*, 16 Wall., 36, cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that state laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that, in some States, laws making such discriminations then existed, and other might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the 14th Amendment was framed and adopted. It was designed to assure to the colored race the en-

joyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.

* * * * *

"If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

* * *

As the United States said in its Supplemental Brief on Reargument in the School Segregation Cases (*Brown* v.

Board of Education, and related cases, Nos. 1, 2, 4, 8, 10, Oct. T. 1953, p. 119):

> "The studies which have been made in preparing this brief have only served to confirm the accuracy of the contemporary historical observations made in the *Slaughter-House* and *Strauder* opinions by members of this Court who themselves had lived during the period when the Amendment was adopted. The great events of the Reconstruction period were still fresh in their minds, and required for them no elaborate investigation into recondite historical materials."

Third. The terms of the Fifteenth Amendment and the fact that its enactment was deemed necessary—indeed, its ratification was imposed as a condition of readmission upon four former Confederate States—join in showing that the Equal Protection Clause did not of its own force guarantee or grant voting rights.

Section 1 of the Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States *or by any State* on account of race, color, or previous condition of servitude—"

The words that we have italicized would be surplusage if the Fourteenth Amendment that prohibited a State from denying to anyone within its jurisdiction the equal protection of the laws had by reason of that language standing alone given to Negroes the right to vote. Moreover, if the Equal Protection Clause had of its own force guaranteed to the former slave a substantive right to equality in voting power, why should Congress have insisted that any former Confederate State ratify the Fifteenth Amendment in addition to the Fourteenth as a prerequisite to readmission to representation in Congress following the establishment of military government under the Reconstruction Act (Del. Br. 56-57)?

Yet that is precisely what Congress did. By Section 6 of the Act of April 10, 1869, c. 17, 16 Stat. 40, 41, it was provided that Virginia, Mississippi, and Texas would not be admitted to representation in Congress until their several legislatures ratified the Fifteenth Amendment. And, by Section 8 of the Act of December 22, 1869, c. 3, 16 Stat. 59, 60, Congress similarly provided that Georgia's Senators and Representatives would not be seated in Congress until the Georgia legislature similarly ratified the Fifteenth Amendment.

Those conditions, it can easily be demonstrated, were imposed because without the ratification of those four States the Fifteenth Amendment would not become a part of the Constitution.

That Amendment was proposed on February 27, 1869 (15 Stat. 346). There being then 37 states in the Union, the votes of 28 were necessary for ratification. If New York's withdrawal of ratification was ineffective, ratification was completed by Iowa; if effective, by Nebraska two weeks later. Up to 1871, 31 States ratified the Amendment; but if Georgia, Virginia, Mississippi and Texas had not been pushed into ratification by the Acts of Congress that have just been cited, the Fifteenth Amendment would not at that period have become effective.[3]

This Court, likewise, recognized that the Fifteenth Amendment provided something more than the Fourteenth (*Minor* v. *Happersett*, 21 Wall. 162, 175):

> "And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: [quoting it.] The fourteenth

[3] The details of the votes on ratification of the Fifteenth Amendment appear in *The Constitution of the United States of America* (Sen. Doc. 49, 87th Cong., 1st sess., p. 31), as well as in the more elaborate annotated document, *The Constitution of the United States of America: Analysis and Interpretation* (Sen. Doc. 170, 82d Cong., 2d sess., p. 47).

> amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?"

Not until *Nixon* v. *Herndon*, 273 U.S. 536, which struck down a Texas statute that specifically enacted that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas," is there any suggestion that such discrimination in voting was unlawful under the Fourteenth rather than the Fifteenth. As the Court there said (pp. 540-541) citing the *Slaughter-House Cases* and *Strauder* v. *West Virginia*, "We find it unnecessary to consider the Fifteenth Amendment because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them."

Sincock *et als.* tender assertions that badly confuse the differing scope of the Fourteenth and Fifteenth Amendments.

Thus, they commence their argument by saying (Pl. Br. 29) that "The Fourteenth Amendment protects a voter's right to cast a ballot without unfair impairment or invidious discrimination in the exercise of suffrage"—but two out of the three cases that they cite, *Smith* v. *Allwright*, 321 U.S. 649, and *Terry* v. *Adams*, 345 U.S. 461, are Fifteenth Amendment cases pure and simple.

They say further (Pl. Br. 56):

> "Since 1868, states were admitted which maintained segregated school systems. Closer to the point here,

> Constitutions containing the grandfather clause for suffrage qualifications were approved. Congressional acceptance of the original constitution did not save it from later challenge under the Fourteenth Amendment or other provisions of state constitutions."

We deal with the school problem under our Point IIE below. Here we point out only that the foregoing passage is egregiously wrong both as a matter of chronology and as a statement of constitutional law.

1. In 1868, the Fifteenth Amendment had not yet been formulated; indeed, as we have just shown a few pages back, it was not even submitted to the States for ratification before February 1869!

2. The earliest grandfather clause dated from 1890. See Monnet, *The Latest Phase of Negro Disenfranchisement*, 26 Harv. L. Rev. 42. None was in the constitutions that Congress so carefully, see *United States* v. *Florida*, 363 U.S. 1, examined in 1868.

3. When the grandfather clause was ultimately struck down by this Court, reliance was had solely on the Fifteenth Amendment. *Guinn* v. *United States*, 238 U.S. 347; *Myers* v. *Anderson*, 238 U.S. 368. Neither opinion so much as mentions the Fourteenth Amendment.

Fourth. The terms of the Nineteenth Amendment similarly show that in denying to the States the right to deprive citizens to vote on grounds of sex, it was imposing a restriction not imposed by the Equal Protection Clause of the Fourteenth.

The first sentence of the Nineteenth Amendment reads:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States *or by any State* on account of sex."

Here again, if the Equal Protection Clause or any other part of the Fourteenth Amendment had saved women from

discrimination in respect of the right to vote, the long campaign to propose and then to ratify the Nineteenth Amendment would have been completely unnecessary.

That proposition is supported by a square holding here, *Minor* v. *Happersett*, 21 Wall. 162, affirming 53 Mo. 58.

There the Constitution of Missouri limited the right to vote to male citizens. Mrs. Minor, relying on the Fourteenth Amendment as well as on the Guaranty Clause (R. 4, No. 182, Oct. T. 1874), sought to compel the registrar of elections to enroll her as a voter. Defeated in the Missouri courts, she came here, arguing (Br. for Appellant, p. 40) that "A citizen disenfranchised is a citizen attainted; and this, too, in the face of the fact, that you look in vain in the great charter of government, the Constitution of the United States, for any warrant or authority for such discrimination. To that instrument she appeals for protection."

But her appeal to the Constitution and her writ of error directed to the court below were equally without avail; a unanimous Court held that, despite her undoubted citizenship, neither the privileges and immunities clause of the Fourteenth Amendment nor the Guaranty Clause of Article IV, Section 4, conferred upon her any right to vote.[4]

Significantly enough, although *Minor* v. *Happersett* was litigated in the early Eighteen Seventies, when Reconstruction was still a vivid memory, at a time before the essential Federal military support of the new Southern

[4] The statement in *Baker* v. *Carr*, 369 U.S. at 223, note 48, that in *Minor* v. *Happersett* "the question was whether a government republican in form could deny the vote to women," is only partially correct, inasmuch as the Court also considered and rejected Mrs. Minor's contentions under the Fourteenth Amendment.

The final ruling in *Minor* v. *Happersett*, 21 Wall. at 178, that "the Constitution of the United States does not confer the right of suffrage upon anyone," was disavowed in *Ex parte Yarborough*, 110 U.S. 651, 664.

State governments had been withdrawn, counsel for Mrs. Minor in their brief did not mention the Equal Protection Clause, much less invoke it, and this Court's opinion similarly did not make the slightest reference to the Equal Protection Clause.

Otherwise stated, lawyers and judges whose mature professional years were contemporary with the drafting, adoption, submission, ratification, and initial interpretation of the Fourteenth Amendment never considered that its Equal Protection Clause conferred upon any one the bare right to cast a ballot, much less that it conferred upon a voter a right to be protected against "dilution" or "debasement" of his vote under any system of legislative apportionment then in force.

Some of the passages in the brief filed here on behalf of the United States similarly read into the Fourteenth Amendment much that the fact of passage of the Fifteenth and Nineteenth proves not to have been there originally. Thus it is said (U.S. Br., *A.C.*, 36-37),

> "The thrust of the Fourteenth Amendment is toward the elimination of all class distinctions in the exercise of political and other civil rights. There are no qualifications under the equal protection clause. It has general application."

And again (*id.*, 43),

> "The Fourteenth Amendment guarantees * * * equality before the law defining the opportunities for participation in self-government."

Some allowance must of course always be made for forensic hyperbole, particularly in documents composed under the pressure of demanding deadlines. None the less, we think that every lawyer who had had in mind either the Fifteenth Amendment, or *Minor* v. *Happersett*, 21 Wall. 162, or the Nineteenth Amendment, or indeed any one of those three, would have phrased the quoted passages much more narrowly.

Fifth. The materials adduced above were not before the Court in *Baker* v. *Carr*, where the battle raged over justiciability and over what was comprised within an admitfedly non-justiciable political question.

In the past, this Court has always been ready to vary, indeed to overrule, its earlier decisions, as additional and more precise historical materials came to light. See *Vidal* v. *Girard's Ex'rs*, 2 How. 127, qualifying *Baptist Ass'n* v. *Hart's Ex'rs*, 4 Wheat. 1, on the basis of additional data concerning the early practice of the English Chancery; *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 72-73, overruling *Swift* v. *Tyson*, 16 Pet. 1, in large measure on Mr. Charles Warren's researches into the history of the First Judiciary Act; *Nye* v. *United States*, 313 U.S. 38, 47-48, which overruled *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402, on the basis of historical research into the Peck impeachment in 1831.

We do not ask that *Baker* v. *Carr* be reconsidered—or even limited. We accept it fully and ungrudgingly; indeed we ask that it be applied as written, with particular reference to the "well developed and familiar" standards under the Equal Protection Clause (369 U.S. at 226), standards to which we have ourselves appealed (Point IIB, *supra*), and which the court below so egregiously disregarded.

Rather, we bring to the Court's attention the materials bearing on the contemporaneous construction of the Equal Protection Clause, by the Congress, by the States that ratified the Fifteenth Amendment, and by this Court, in order to point out why it is that this Clause cannot serve to support the elaborate structure of personal political preferences that permeates the opinion below and that is sought to be rested thereon by our opponents.

The draftsman and principal proponent of the Fourteenth Amendment assured his colleagues that his proposal did not affect suffrage in the several States, and all con-

cerned acted on that assurance by drafting, submitting and requiring the ratification of the Fifteenth Amendment. This Court held squarely that the Fourteenth Amendment did not confer upon women any right to vote; such a right, except where some of the States provided otherwise, had to await the Nineteenth Amendment. Yet the court below in the present case held (J.S. App. A51-A53) that the Equal Protection Clause set a limit of 1½:1 as the largest permissible variation between representative districts, and that this Clause was violated in Delaware by a ratio of 2:1 between Senate districts.

We will not deny for a moment that the smaller disparity is more desirable; indeed, the Delaware Reapportionment Committee's later proposals (Del. Br. 107-108 Appendix, *infra*, pp. 73, 78) specifically provide for the 1½:1 ratio.

What we say is that, when attention is focused on the original scope of the Equal Protection Clause, a scope that was crystal clear to contemporaries, who without expressed dissent viewed it as narrow indeed; once it is recalled that the broader voting rights that are axiomatic today stem from the Fifteenth and Nineteenth Amendments, rather than from the Fourteenth, it will become apparent that the district's court's exercise in arithmetical proportions to which we have just referred cannot possibly be rested on or drawn from the Equal Protection Clause; and that, necessarily, there is similar lack of support in that clause for the "principles" and the "postulates" that our opponents and those allied with them ask this Court to erect into constitutional absolutes.

D. Neither Baker v. Carr nor Gray v. Sanders even purported to decide whether a State could apportion one house of its legislature on an area basis on the Federal pattern

The actual holding in *Baker* v. *Carr* was very narrow (369 U.S. at 197-198):

> "* * * we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable

> cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that appellants have standing to challenge the Tennessee apportionment statutes."

Nothing more was decided, as Mr. Justice Stewart emphasized in concurring (369 U.S. at 265 and 266), and as Mr. Justice Clark similarly emphasized when in his concurrence he criticized the Court's opinion for not giving more guidance than it did (369 U.S. at 251 and 261).

Obviously, therefore, the Court in *Baker* v. *Carr* decided nothing whatever concerning the constitutionality or otherwise of a Federally-patterned State legislature, much less just how analogous that Federal analogy was required to be.

Nor was that question decided by anything in *Gray* v. *Sanders*, 372 U.S. 368; indeed, the point was expressly and explicitly reserved (p. 376; italics added):

> "This case, unlike *Baker* v. *Carr*, *supra*, does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives. Nor does it include the related problems of *Gomillion* v. *Lightfoot*, 364 U.S. 339, where 'gerrymandering' was used to exclude a minority group from participation in municipal affairs. *Nor does it present the question, inherent in the bicameral form of our Federal Government, whether a State may have one house chosen without regard to population.*"

None the less, in answer to our demonstration that Congress contemporaneously construed the Fourteenth Amendment as not to prohibit area apportioned State Senates with disparities running as high as 5.2:1 and 5.7:1 (Del.

Br. 55-71), the United States asserts (U.S. Br., *A.C.*, 37) that—

> "The constitutions of the States readmitted to the Union after the enactment of the Fourteenth Amendment were all before the Court in *Baker* v. *Carr*, * * * for Mr. Justice Frankfurter developed essentially the same arguments in this dissenting opinion in an effort to show that the Amendment is not concerned with legislative apportionment (369 U.S. 186, 266, 315-317). The Court found the history unpersuasive * * *."

And, again (*id.*, 54),

> "The history that appellants invoke was all brought to the Court's attention in *Baker* v. *Carr* by the dissenting opinion of Mr. Justice Frankfurter. The argument was rejected."

Very plainly, the additional materials that we have adduced in this reply brief—the statements by Mr. Bingham and Senator Howard regarding the scope of the Fourteenth Amendment, the vote in the House that refused to strike Florida from the readmission bill because her legislature was malapportioned, the light that the very adoption of the Fifteenth and Nineteenth Amendments throw on the scope of the Fourteenth, the Fourteenth Amendment aspect of *Minor* v. *Happersett*, 21 Wall. 162—none of those materials were before the Court in *Baker* v. *Carr*. Indeed, neither of the briefs filed by the United States as *amicus curiae* in *Baker* v. *Carr* so much as cited *Minor* v. *Happersett*.

In any event, on the assumption that *Baker* v. *Carr* has irrevocably determined that the Fourteenth Amendment *is* concerned with legislative apportionment, that case plainly did not determine "whether a State may have one house chosen without regard to population"— nor did *Gray* v. *Sanders*, 372 U.S. 368, 376, from which we take those words.

Certainly nothing in *Baker* v. *Carr* rejected the notion, to which our historical materials drawn from Congressional action in the Reconstruction period were primarily di-

rected (Del. Br. 55-71), that States were entirely free under the Fourteenth Amendment to apportion one house of their legislature without regard to population. Even to intimate that this is the holding of *Baker* v. *Carr* is to indulge in the most wishful kind of misreading.

We suggested above, Point IIC, that *Baker* v. *Carr* will not support a too elaborate structure of voting rights. We say here, what must be plain from the opinion in *Baker* v. *Carr*, that it decided nothing as to the merits or demerits of any particular plan of apportionment, other than perhaps the "crazy quilt." And we repeat what we think we have already demonstrated beyond any possible doubt, that the Congresses nearest in time to the adoption of the Fourteenth Amendment saw no constitutional infirmity in the constitution of any State that apportioned one house of its legislature by areas and counties rather than by population.

E. Nothing in Brown v. Board of Education is authority for the construction of the Equal Protection Clause that Sincock et als. and the United States now ask the Court to place upon it

Both of our opponents place considerable reliance on *Brown* v. *Board of Education*, 347 U.S. 483. Sincock *et als.* say (Pl. Br. 51) that the decision there "is perhaps the best illustration of the hazards and general disutility of contemporaneous construction," while the Solicitor General, citing the same decision (U.S. Br., *A.C.*, 53), says that "this Court long ago made it clear that the protection afforded by the Fourteenth Amendment cannot be limited by historical research into the conscious intent of its framers."

These passages not only misread the decision but also misunderstand the technique that the Court there applied.

Here is the heart of what this Court said in connection with the historical materials (*Brown* v. *Board of Education*, 347 U.S. at 489-490, 492-493; our italics):

"Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the States, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. *At best; they are inconclusive.* . . .

. . . . . .

"An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. . . . As a consequence, *it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.*

. . . . . .

"In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

Now, very plainly, that is not the present case.

For one thing, malapportionment was nothing new on the American scene; it was complained of in 1868 just as it is complained of today, as the discussion over Florida's readmission, Point IIA, *supra*, plainly discloses; and today no new factors, except perhaps the factor of degree, have been injected into the problem.

For another, the Reconstruction Congress *was* concerned about schools, as the conditions imposed on the readmission of Virginia, Mississippi, and Texas show (Del. Br. 64-65).

One of the "fundamental conditions" imposed on Virginia was this: "Third, That the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State" (16 Stat. at 63). Identical conditions were imposed on Mississippi (16 Stat. at 68) and Texas (16 Stat. at 81).

And in *Brown* v. *Board of Education* the United States summed up its researches as follows (Supp. Br. for the U.S. on Reargument, 76):

> "In sum, therefore, the debates on the readmission of the Southern states into the Union fail to disclose any definite understanding as to the effect of the Fourteenth Amendment on school segregation, but it is of some significance that none of the State constitutions submitted to and approved by Congress as being 'in conformity with the Constitution of the United States in all respects' [the language of § 5 of the first Reconstruction Act of March 2, 1867, 14 Stat. 428, 429] provided for segregated schools."

This essential inconclusiveness should be contrasted with the materials on legislative apportionment:

First, the draftsman of the second sentence of Section 1 of the Fourteenth Amendment, Mr. Bingham of Ohio, stated specifically that State suffrage was not affected thereby, and Senator Howard of Michigan said that Section 1 of the proposed amendment did not give the right of voting. Point IIC, *supra*. That is not inconclusive.

Second, Florida was not excluded from readmission because her constitution placed control of her legislature in the sparsely-settled counties. Point IIA, *supra*. That is not inconclusive.

Third, South Carolina and Georgia were readmitted although in their area-apportioned Senates there were discrepancies in voting rights on the order of 5.2:1 and 5.7:1, respectively. Del. Br. 55-71. That is not inconclusive.

Fourth, the Fifteenth Amendment was proposed, and thereafter it was required to be ratified as a prerequisite to readmission by the four former Confederate States that were still unrepresented in Congress when that Amendment was submitted. Point IIC, *supra*. That is not inconclusive.

Fifth, this Court's decision in *Minor* v. *Happersett*, 21 Wall. 162, showed that the Fourteenth Amendment did not give women citizens any right to vote. Point IIC, *supra*. That is not inconclusive.

This series of events points clearly in only one direction. It shows, first, that the Fourteenth Amendment was never considered to confer the right to vote, and it shows, second, that State constitutions with area-apportioned senates were considered to be perfectly consistent with its terms.

We think it also shows, third, that in the latter respect Sincock *et als.* and the Solicitor General join in urging this Court to rewrite the Equal Protection Clause to mean precisely the opposite of what by common understanding it meant at the beginning.

What they ask is not construction; what they ask is amendment of the Constitution by fiat.

III. THE APPORTIONMENT OF THE DELAWARE GENERAL ASSEMBLY EFFECTED BY THE 1963 AMENDMENT TO THE DELAWARE CONSTITUTION IS ENTIRELY CONSISTENT WITH WELL-SETTLED INTERPRETATIONS OF THE EQUAL PROTECTION CLAUSE

Delaware's present apportionment, the one made by the 1963 amendment to its Constitution, is roundly denounced here by our opponents.

Sincock *et als.* call it "Haphazard, Crazy-Quilt" (Pl. Br. 59), "deny the existence of any pattern of apportionment for the Delaware General Assembly" (*ibid.*), assert that "There is No Reasonable Basis" therein (Pl. Br. 61) and that "The Defendants Can Offer No Rhyme or Reason for

the Gross Inequalities in the Representation" (Pl. Br. 37), and attack it in varying forms of phrase (Pl. Br. 59-65).

The Solicitor General sounds the same note. His Point II is that "The Delaware apportionment creates gross discrimination among voters without a rational foundation in policy." He asserts under that point (U. S. Br., *A.C.*, 27) that the Delaware officials "offer no explanation of the gross discrimination in representation", and that (*id.*, 30) the plan contains a "disingennous effort". Under Point III (*id.*, 43) he asserts that "we can discover *no* policy to support the caprcious discriminations in the appointment of both branches of the Delaware legislature." Under Point IV (*id.*, 45), he refers to "gross inequalities," and, moving to a climax, he concludes (*id.*, 49) that "the apportionment of both houses of the Delaware legislature is a crazy-quilt, having neither rhyme nor reason."

Inasmuch as the plan that is denounced in the foregoing terms was not the consequence of legislative apathy, of legislative inertia, nor of disregard by the legislature of the command of the State's fundamental law, factors that were indeed present in *Baker* v. *Carr*, 369 U. S. 186, but represents an affirmative act designed to meet affirmatively the requirements of *Baker* v. *Carr*, namely, an amendment to the Delaware Constitution passed by two successive General Assemblies with a general election intervening, as the Delaware Constitution requires (Art. XVI, § 1; J. S. App. A76), these are most serious charges for the Solicitor General of the United States to make against a State of the Union.

We should have supposed that, as an essential preliminary to an understanding of the apportionment plan effected by the 1963 amendment to the Delaware Constitution (J.S. App. A77-A81), there would first have been studied in detail the proceedings of the body that drafted this amendment, the Bipartisan Committee. Those proceedings are summarized in the testimony of its chairman, Mr.

Houston Wilson (Del. App. 51a-97a), and are set forth verbatim in Def. Ex. 1 (Del. App. 77a-78a, 100a-339a).

But neither in the brief of the United States as *amicus curiae* nor in the brief of Sincock *et als.* is there a single reference to a single page of the Committee's proceedings to support the criticisms and characterizations made in both concerning the plan that the Committee drew up.

Accordingly, we shall briefly summarize those proceedings.

By way of preliminary, we may note that anyone who examines the account of the Committee's deliberations will at once be struck by the similarity between the work of that group and the work of the Federal Convention that framed the Constitution of the United States, whether regard is had to the full *Records of the Federal Convention*, edited in three volumes in 1911 by Professor Max Farrand, or to the latter's synopsis, published two years later as *The Framing of the Constitution*. There is the same step by step progression, the same central crisis, the same solution of that crisis through a spirit of concession, the same quickening in tempo as the completed document takes shape, and the same ultimate unanimity joined with the same realization of the finished work's imperfections. Perhaps the most striking difference is that, unlike the far more famous and important meetings at Philadelphia in 1787, the Delaware Committee that met in 1962 admitted the public (Del. App. 58a, 82a), recorded its proceedings verbatim and published them immediately, and its members consulted their constituents in the intervals between meetings (Del. App. 124a-125a, 127a, 166a, 179a, 192a, 198a-199a, 248a).

1. *Background and Membership of the Delaware Bipartisan Committee on Reapportionment.* The record makes it abundantly clear that the Bipartisan Committee was appointed to meet the threat posed by the present action, which had been brought on June 5, 1962 (J.S. App. A14).

This is clear from the minutes (Del. App. 102a, 173a). The membership appears to have been selected by July 5 (Del. App. 92a-93a), and it held three meetings, on July 12, 17, and 21 (Del. App. 100a, 163a, 254a). It made its report on July 23 (Del. App. 63a). As we have pointed out elsewhere, the court below on July 25 stayed the present proceedings, but only in part, until August 7 (J.S. App. A1-A6).

The Committee was composed of 8 members, four from New Castle County, with two of those representing the City of Wilmington and two rural New Castle County; and with two members each from Kent and Sussex Counties. Each territorial unit was represented by one Democrat and one Republican. Six of the eight members were lawyers. (Del. App. 52a, 55a-56a, 85a, 100a, 109a.) Notwithstanding the Committee's geographical and political diversity, its final report was unanimous (Del. App. 83a, 94a, 338a-339a).

2. *The Committee's Basic Premises.* Examination of the record of the Committee's proceedings reflects the basic premises upon which it proceeded in drafting what became the 1963 reapportionment amendment to the Delaware Constitution; we list those premises below.

First, lawyer members of the Committee had made a careful study of the several opinions in *Baker* v. *Carr* (Del. App. 79a-80a, 114a-117a). They were concerned with endeavoring to extract guidelines from that decision (Del. App. 110a, 112a, 116a), and in consequence had studied other apportionment rulings from State and lower Federal courts (Del. App. 79a, 110a-114a, 119a-120a, 205a-206a, 271a-272a).

Second, the Committee was fully aware that its task was to draw a line (Del. App. 112a) "between a rational plan on the one hand, and an invidious discrimination on the other." The proceedings reflect an appreciation that, the greater the deviation from mathematical equality, the more necessary it was to have "a good, sound reason for doing this" (Del.

App. 119a), and that "any crazy quilt for which there isn't any foundation or any rationale will not be upheld" (Del. App. 138a). The proceedings are full of discussions pressing one point or another on the footing that it was rational and did not represent merely a political whim (Del. App. 138a, 205a-206a, 209a, 210a-211a), and, on the other hand, of questions asking how particular discrepancies could possibly be defended (Del. App. 152a, 204a, 216a). Similarly, members were acutely aware of the undesirability of any elections at large (Del. App. 239a-240a, 276a, 285a-286a).

Third, the Committee felt very strongly that it was infinitely more desirable for the necessary reapportionment to be effected by the people through their legislature, i.e., by amendment of the Delaware Constitution pursuant to the terms of that instrument, than by the decree of a Federal court (Del. App. 102a, 173a-174a, 176a-177a, 188a-189a, 195a).

Fourth, the Committee was aware that its plan had to be palatable to the body to which the amending process is committed under the Delaware Constitution, the State's General Assembly, and that there was no utility in recommending a plan that had no practical hope of passage (Del. App. 108a-109a, 136a, 158a-159a, 168a, 206a, 210a, 217a, 226a, 227a, 237a, 247a, 266a, 269a). The Committee recognized that any plan that it presented would need to be fair and acceptable to all four groups in the General Assembly, the Democrats, the Republicans, the Upstaters, and the Downstaters (Del. App. 168a).

Fifth, the Committee realized fully that its task was to persuade the district court that the State of Delaware was proceeding in the best of faith (Del. App. 187a, 190a, 328a-329a), and that, if the State did not reapportion itself, it risked reapportionment by Federal court order (Del. App. 103a, 240a, 273a).

Sixth, the Committee was acutely aware of the pressure being exerted by the district court in the present action. As

one Committee member who represented the Delaware election officials below put it (Del. App. 104a), "* * * they are going to be very firm in the matter * * * and expect something to be accomplished."

Later comments were stronger in tone; we quote some representative formulations: "* * * how close is the gun to our back?" (Del. App. 114a); "the 'Sword of Damocles' which is hanging over the State of Delaware" (Del. App. 129a); "the litigation in a sense being the gun at our back" (Del. App. 136a); "the legislature * * * are directly under the hammer to do something now" (Del. App. 185a); "we are literally staring down the barrel of a Federal order" (Del. App. 190a); "our legislature * * * with a gun pointed right at them" (Del. App. 192a); "they are squarely under the gun" (Del. App. 199a).

Awareness was general that the district court would not wait until 1965 (Del. App. 186a, 187a, 270a), as indeed that court held when, four days after the Committee's last session, it granted a partial stay of the present proceedings until only August 7, 1962 (J.S. App. A1-A6).

Seventh, the Committee was unable to propose an ideal plan because the time available to it precluded any real redistricting or redrawing of boundaries within any of the three counties (Del. App. 150a, 209a-210a, 226a, 251a, 269a, 283a, 293a). As put by the Chairman (Del. App. 177a), "In a very real sense of the word, we are grasping for a hurried solution." See also Del. App. 182a, 240a, to the same effect.

3. *The Committee's Thirteen Step-by-Step Resolutions.* The record shows that the Committee proceeded step by step, in logical fashion, to formulate a rational plan for reapportioning the Delaware General Assembly. Each one of these steps, of which there were thirteen here pertinent, won the unanimous approval of all the members; and at the close of the last meeting, the plan was unanimously approved as a whole (Del. App. 338a-339a).

By way of preliminary, the Committee expressed a preference for the Federal pattern as the basic plan for the Delaware legislature (Del. App. 107a, 112a-113a, 121a-122a). To implement that preference, three motions were unanimously adopted, as follows:

One, the Committee voted for a bicameral legislature (Del. App. 122a).

Two, the Committee voted for a Senate apportioned on a rational geographical basis (Del. App. 122a-124a).

Three, the Committee voted for equal county representation in the Senate (Del. App. 130a, 145a).

In view of the likelihood of population increases in the near future, the Committee then voted unanimously, *Four*, to retain the existing Senatorial Districts (Del. App. 145a-150a). As has been noted, the time available did not permit the drawing of new boundaries for such districts (Del. App. 150a, 209a-210a, 226a, 283a, 293a).

The problem of allocating the two additional senators to Kent and Sussex Counties, required under *Three* above, was felt to be a problem for those counties alone (Del. App. 250a).

There were three possibilities (Del. App. 255a-256a): Elect both at large, elect both partly at large, or realign the entire county. It was unanimously voted, *Five*, to select the second alternative, dividing Sussex County between east and west (Del. App. 258a).

Six, the same plan was also unanimously adopted for Kent County (Del. App. 259a-260a). There was some question whether the division there should be horizontally or longitudinally (Del. App. 258a-259a), but in the end the same east-west division provided in Sussex County was adopted, again unanimously (Del. App. 290a-291a).

We should add a word of explanation here, in view of the confusion that appears to have arisen from the absence

of any map in the record (U. S. Br., *A.C.*, 28-29, 44) concerning these divisions.

The floterial Senatorial Districts in both Kent and Sussex Counties (§§ 2 and 3, J. S. App. A78-A79) are based on existing Representative Districts as those are established by Art. II, § 2, of the 1897 Constitution (J. S. App. A74-A75). The line separating the Kent County floterial districts runs from north to south three-quarters of the distance down the county and then turns east to the ocean, while the Sussex County dividing line starts at the ocean at the boundary between Milford and Lewes Hundreds, and runs first west and then almost due south. Admittedly both lines are easier to visualize on a map than to describe verbally.

The problem of the House of Representatives proved more difficult; it involved several complex factors.

On the one hand, the factors making for the preservation of existing Representtive Districts were (a) the impossibility of redistricting within the time available, (b) the practical difficulty in the way of asking any Representative to vote to abolish his own seat (Del. App. 206a), and (c) the strong likelihood of substantial population growth in the near future, especially in the down-State counties (Del. App. 134a-135a, 206a-207a, 210a). It was said that the fact that a particular district had not grown in ten years was without any bearing whatever on the future (Del. App. 206a), an assertion that was supported by the doubled growth of Kent County in the past decade and that was further and dramatically demonstrated in the instance of the 15th Representative District of New Castle County, Blackbird Hundred (J.S. App. A72). Although that District had not grown in 70 years (Del. App. 92a), it is now in process of absorbing a great influx of population from a new Shell Oil Co. plant (Del. App. 152a), as indeed even the district court's own reapportionment plan recognized (Ct. Ex. 4, Del. App. 98a).

On the other hand, the preservation of existing Representative District lines perpetuated existing imbalances (Del. App. 152a, 204a).

There were lengthy discussions regarding the size of the ideal Representative District, whether 12,000 or 15,000, and what to do about major fractions (Del. App. 154a-155a, 160a-163a, 218a-221a); regarding the method of dividing districts that were under-represented and the nomenclature to be used for the divisions (Del. App. 235a-236a, 263a); regarding the question of further subdivisions after each decennial census, in particular whether the historic Representative Districts should be subdivided *de novo* every ten years, or whether each of the divided districts should be treated as existing districts for the purpose of further subdivision (Del. App. 249a, 278a-282a); and regarding the desirability of placing a ceiling on the ultimate membership of the House of Representatives (Del. App. 158a-159a, 250a-251a, 325a).

After full discussion, the Committee voted unanimously, *Seven*, that an additional representaive would be allocated for each additional 15,000 population or major portion thereof in excess of the original 15,000 (Del. App. 221a-222a).

This left the question of how those additional representatives should be allocated.

Towards the close of the Committee's second meeting, a motion to allot additional representatives on the basis of redistricting the existing districts was defeated 2-5 (Del. App. 241a-243a), and another resolution to subdivide existing districts lost 3-4 (Del. App. 243a-245a).

Just before the dinner recess at the Committee's third session, a compromise was offered by a Wilmington member, namely, to let Kent and Sussex Counties retain their existing Representative Districts, provided New Castle County's existing Representative Districts were

subdivided on the basis of 15,000 or a major fraction thereof after each census (Del. App. 286a-288a). After dinner, following a relatively short discussion (Del. App. 291a, 295a-298a), this compromise step, *Eight*, was unanimously adopted (Del. App. 298a). This was the "Great Compromise" of the Delaware Reapportionment Committee of 1962.

It included a subsidiary compromise, namely, that the increases there given to New Castle County in the General Assembly would not be reflected in the composition of any future constitutional convention; a Wilmington member said he would take his chances on the convention because he was so very anxious to have one (Del. App. 295a, 299a).

Subsequent motions presented no difficulty; we list the results here; all of the votes were unanimous.

Nine, redistricting within existing Representative Districts to be effected by a Redistricting Commission consisting of the Governor and the chairmen of the two major political parties (Del. App. 302a, 305a-307a).

Ten, anti-gerrymander criteria would govern all redistricting (Del. App. 307a-314a).

Eleven, time-limits for redistricting were established (Del. App. 314a-315a).

Twelve, redistricting was made subject to judicial review (Del. App. 316a-324a).

Thirteen, redistricting was made enforceable by mandamus (Del. App. 325a-326a).

(We have purposely omitted votes regarding provisions for a constitutional convention (Del. App. 331a-336a) that failed to gain acceptance by the General Assembly as part of the 1963 amendment; see Del. App. 94a-95a.)

4. *The Committee's evaluation of its work.* Not one of the eight committeemen considered their work perfect; here

are typical comments (Del. App. 336a-338a): "I endorse the plan as a compromise. It is a step in the right direction but it is not true apportionment. * * * It is a step in the right direction." "I, in the spirit of compromise, intend to vote for the entire plan * * * the plan for reapportionment is a good plan." "I do not believe that this is the best possible plan that we might have adopted, but I believe that under the circumstances it is a good plan and should be adopted." "* * * even though I recognize * * * that we have not achieved the ideal * * * at least it is a step in the right direction and I think that succeeding groups who may have to consider this question will go in the direction of ameliorating the situation and getting closer to the ideal." "I believe the interests of the whole State of Delaware have been adequately represented and protected in these proceedings. And I further believe that the reapportionment amendment is a reasonable one * * *." "I know that I have not seen all that I would have liked to have been included in a formal report to the Governor's committee, but I feel that the work that this group has done is so permeated with a spirit of sincerity, conscientious endeavor, and statesmanship that not to vote for it would do a disservice to my fellow subcommittee members and to the Governor's committee." "It indicates more progress than we have made on this question over a period of many years."

Finally, the Chairman summed up as follows (Del. App. 338a):

> "Gentlemen, at the outset we conceived our problem to be that of coming up with a plan which was rational, which was not invidiously discriminatory. At the outset it was our responsibility to take the first step to evidence to the District Court of the State of Delaware that this State is ready to go forward in all good faith towards evolving and promulgating and making effective such a plan.
>
> "It was also our responsibility to devise a plan which we believe in our combined opinions would be

acceptable to the State as a whole, although not necessarily to each separate segment of the State. By the State I mean as it speaks through its representatives in the General Assembly.

"I sincerely believe that in the historic spirit of compromise, which is one of the fundamental principles of a Republican form of government, we have evolved such a plan as a result of our deliberations.

"I want to thank all of you for the statesmanlike spirit in which you have, each and every one, approached this problem and have come forth with this report. I shall not only vote in favor of the plan but I shall commend it to the parent body, and if called upon I will commend it to the General Assembly."

Immediately thereafter, the report in its entirety was unanimously approved (Del. App. 338a-339a).

"We call that action reasonable," said Mr. Justice Brandeis in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389, 403, 406, "which an informed, intelligent, just-minded, civilized man could rationally favor."

Judged by that standard, the 1963 amendment to the Delaware Constitution, which as a matter of State law (*Opinion of the Justices*, 190 A. 2d 519) is now in force, plainly passes muster, certainly when the verbatim proceedings of those who fashioned it have been examined. For those proceedings clarify and illuminate much that on the face of the amendment's text may have appeared strange, and even unreasonable. Those proceedings show the reasons behind every element and every factor of the amendment, reasons expressed contemporaneously, not formulated later as retrospective rationalizations.

The proceedings themselves, Defendants' Exhibit No. 1 at the trial, are found in three volumes that extend to 375 type-

written pages (Del. App. 78a, 339a). Only a single set of these volumes was filed with the court.

It would of course be sheerest speculation to inquire whether any of the three judges read all, or a part, or none, of these 375 pages. But it is the demonstrable fact that none of the opinions filed below following the hearing of the present cause (J.S. App. A16-A67) reflect in any degree whatever the deliberations of the Bipartisan Reapportionment Committee, or indeed show any awareness whatever of the problems that Committee faced or of the reasons why they solved these problems as they did; and it is also the demonstrable fact, already pointed out above, that not one page of the Committee's proceedings (Del. App. 100a-339a) is cited or otherwise referred to in either of the two briefs that have been filed against us.

In the light of those deliberations, we submit that only a frenetic doctrinaire could or would contend that the 1963 amendment to the Delaware Constitution (*Baker* v. *Carr*, 369 U.S. 186, 226) "reflects *no* policy, but simply arbitrary and capricious action."

Accordingly, in view of the arguments now made against our position, we are constrained to recall the words with which Mr. Justice Holmes inveighed in 1930 against reading too much into the Fourteenth Amendment. He was dealing with a State statute imposing a tax that was struck down under the Due Process Clause, but what he said (*Baldwin* v. *Missouri*, 281 U.S. 586, 595) is applicable in every respect to a State constitutional provision apportioning a legislature that, as here, has been struck down by a court of the United States under the Equal Protection Clause:

> "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the 14th Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to

> strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the 14th Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass." * * *"

IV. THE DISTRICT COURT'S REFUSAL TO GIVE THE DELAWARE GENERAL ASSEMBLY SUFFICIENT TIME TO REAPPORTION THE STATE, AND ITS ISSUANCE OF AN INJUNCTION THAT PREVENTED AMENDMENT OF THE DELAWARE CONSTITUTION ACCORDING TO THE TERMS OF THAT INSTRUMENT, CONSTITUTED FUNDAMENTAL AND VITIATING ERROR

We wish preliminarily to dispose of the suggestion at Pl. Br. 76 that what was said under the present heading in our brief in chief (Del. Br. 98-110) represents only some incompletely informed views that were formulated "after another counsel has been added to the battery" (*Shibley* v. *United States*, 237 F. 2d 327, 334 (C.A. 9)). The fact is, however, that most of us who signed our brief in chief had represented the Delaware election officials at the trial below (Del. App. 11a-12a). We therefore simply add, what but for the remark at Pl. Br. 76 we should have thought unnecessary, that having affixed all of our names to that brief, as well as to this one, we subscribe to and share full responsibility for all that is said in both.

A. The record shows a continuous course of urgency, haste, and pressure on the part of the district court that is wholly at variance with the standards and approaches prescribed by this Court for litigation involving a State of the Union.

First. The facts as to urgency, haste, and pressure that are reflected in this record speak for themselves: The district court gave the Delaware Legislative just thirteen calendar days to reapportion itself before any authoritative standards for reapportionment had been laid down anywhere.

1. The apportionment of Delaware's Legislature has been constitutionally regulated since 1776, and the present Delaware Constitution provides for its amendment by two successive two-thirds votes of both houses of its General Assembly, with a general election intervening. Art. XVI, § 1, J.S. App. A76.

2. *Baker* v. *Carr* was decided on March 26, 1962, and this action was brought on June 5, 1962 (J.S. App. A14).

3. In view of the provisions of the Delaware Code, the amendatory process, in order to be accomplished by the 121st and 122nd General Assemblies (1961-1962 and 1963-1964) rather than by the 122nd and 123rd General Assemblies (1963-1964 and 1965-1966), was required to be announced by advertising by early August 1962. See J.S. App. A4-A5.

4. The district court, being unwilling to wait for a later amendment, granted a stay only to August 7, 1962. J.S. App. A1-A6.

5. This left the Governor's Bipartisan Committee on Reapportionment only about ten days to prepare its report, a period which was obviously inadequate to enable that Committee to redistrict the State so as to equalize the existing Senatorial and Representative Districts. Point III, *supra*.

6. Throughout the trial as well as in several of his opinions, the presiding judge spoke of the pressure of time and of the "box of time" (Tr. 357, 607, 608-609; J.S. App. A55, A56).

7. At the close of the trial, in his final opinion (J.S. App. A56), the presiding judge set a deadline for the General Assembly "up and to including October 1, 1963, to prepare and enact into law a reapportionment statute acceptable under the law and the guidelines we have endeavored to lay down herein."

8. After the present appeal had been noted, the district court refused to stay pending appeal the injunction (J.S. App. A69-A70) that it had earlier issued without notice or hearing.

Second. The time actually available to the Delaware General Assembly was however very substantially shorter than even the thirteen days granted by the district court, as appears from the Message of the Governor to the Special and Extraordinary Session of the Delaware General Assembly on July 27, 1962. He there said in pertinent part:

> "Unfortunately, time is short. To assure the passage of the Constitutional Amendment for reapportionment within six months, we must act promptly by providing the necessary ⅔ majority in both Houses in order that the first leg of the amendment might be approved before the three month Constitutional period before election begins to run when notice must be given in the newspapers of our three counties.
>
> "The deadline is August 6, 1962. The last date for publication of our weekly newspapers before this is Friday, August 3. Most weekly newspapers will go to press Tuesday, July 31.
>
> "Our work, if it is to be timely, must be concluded by Monday, July 30, 1962. I urge you to act promptly and courageously.

* * * * *

"Let us as dedicated public servants rise to this occasion by passing the first leg on the Reapportionment Amendment. The Federal Courts have stayed any action on the case of *Sincock* vs. *Terry*, pending the outcome of our actions here within the next two legislative days. I sincerely believe that your passage of the Reapportionment Amendment plus the passage of enabling Constitutional Amendments providing for an early Constitutional Convention will demonstrate to the United States District Court that the Delaware Legislature is acting in good faith and that we Delawareans should be given the right to complete the job of reapportioning ourselves through the passage of the final leg of these Amendments during January of 1963."

Third. Moreover, the guidelines laid down by the district court may well prove to be other than the guidelines that this Court will ultimately adopt.

1. As has been seen, Point II D, *supra*, *Baker* v. *Carr* laid down no standard for permissible apportionments beyond those implicit in the Equal Protection Clause. Consequently the district court was imposing a deadline on a State legislature that, necessarily, was sailing an uncharted sea.

2. The validity of the Federal pattern for a State legislature had been specifically reserved here on March 18, 1963 (*Gray* v. *Sanders*, 372 U.S. 368, 376), yet the district court decided that such a pattern was invalid in its opinion rendered on April 17, views that necessarily carried over into its April 30 decree (J.S. App. A68) and into its May 20 *ex parte* injunction (J.S. App. A69-A70).

3. The matter of perfecting the Federal pattern for Delaware has yet to be settled. The majority of the district court rejected that pattern *in toto*. The Governor's Bipartisan Committee (and the Delaware Senate) thought that the Federal pattern could be perfected by equalizing the Senatorial Districts within each County and the Repre-

sentative Districts throughout the State (Del. Br. 107-108; Appendix, *infra*, pp. 68-74): The Solicitor General now insists that there is no Federal pattern unless the Senators from each County are elected by the County at large (U.S. Br., *A.C.*, 13-14, 30, 49-50). Authoritative answers to these questions have not yet been formulated—but the district court set October 1, 1963, two months ago, as the Delaware General Assembly's deadline for finding those answers.

Fourth. The present situation is accordingly very different from that involved in *Watson* v. *Memphis*, 373 U.S. 526, a decision invoked by Sincock *et als.* (Pl. Br. 75-76).

That ruling came nine years after the basic desegregation decision, and eight years after a holding that "the constitutional proscription of state enforced racial segregation was found to apply to public recreational facilities." Accordingly this Court said (p. 529; italics added):

> "Thus, the applicability here of the factors and reasoning relied on in framing the 1955 decree in the second *Brown* decision, *supra*, which contemplated the possible need of some limited delay in effecting total desegregation of public schools, must be considered not only in the context of factual similarities, if any, between that case and this one, *but also in light of the significant fact that the governing constitutional principles no longer bear the imprint of newly enunciated doctrine.*"

Here, however, quite to the contrary, the guidelines for legislative apportionment are neither well settled doctrine nor even newly enunciated doctrine; they are as yet only unenunciated doctrine.

Fifth. As we have shown in detail (Del. Br. 101-103), this Court in the long and bitter *Virginia* v. *West Virginia* litigation indicated that a State of the Union is not to be treated like a simple private litigant, that even when the issue is a simple one—there, a suit seeking only a decree for the payment of money—even when the basic con-

troversy admits of little doubt—there, the obligation of West Virginia to assume her ratable share of the pre-separation pre-Civil War debt of Virginia could not fairly be questioned—even when the defendant is dragging its feet—as West Virginia assuredly was—even in such a situation, the fact that a State of the Union is involved made it appropriate for this Court to await the next session of the legislature. *Virginia* v. *West Virginia*, 241 U.S. 531.

Here, however, where everything was new, and where no single issue had been authoritatively settled, a United States District Court was intent on speed and yet more speed—and allowed the State of Delaware thirteen days to come up with answers to questions still unsolved now, sixteen months later.

That basic fact, obvious and undisputed on the face of this record, speaks for itself. Whether other courts (cf. Pl. Br. 68; U.S. Br., *A.C.*, 58) have similarly acted with undue haste, contrary to the standards laid down in *Virginia* v. *West Virginia*, simply suggests the desirability of a reaffirmation of those standards; it does not justify abandoning them, as all too plainly they were abandoned here.

B. The record demonstrates that the Delaware General Assembly was never allowed a fair opportunity to reapportion itself.

The extent of the prevailing departure from hitherto sanctioned norms governing the relationship between the Nation and the States, a relationship at the very core of our Federal system, is unhappily reflected in the extravagant denunciations with which both Sincock *et als.* and the Solicitor General belabor the Delaware Legislature for its alleged defaults.

First. The following is from the brief of the United States herein (pp. 57-58):

> "Appellants contend (Br. 98-110) that the Delaware legislature should have been given the opportunity

> to reapportion itself before the injunction was issued. The legislature had already had the opportunity. After indicating doubt about the existing Delaware apportionment, the court in a pre-trial order gave the legislature time to act. The deadline was fixed to meet the requirements of Delaware's election laws. The legislature, in response, passed a constitutional amendment at two successive sessions. [After reciting the alleged inadequacies of that amendment:] In short, the Amendment hardly constituted a serious effort by the legislature to give fair representation in either house to all the people of Delaware."

This is a stinging denunciation—but it rests on a demonstrably inaccurate factual basis.

There is not a word in the pre-trial order (Pl. App. 2a-29a) giving the legislature time to act.

The fact is that the district court gave the Delaware legislature only thirteen calendar days to act, from July 25 to August 7, 1962 (J.S. App. A1-A6), an operative period that, as we have shown, was actually very much shorter. This was nearly four months before any pre-trial conference was held. The pre-trial order was not signed until January 7, 1963 (Pl. App. 29a). Even the pre-trial conference in November that preceded the order (Pl. Br. 73) took place well after the first leg of the amending process had been completed and the form of the amendment settled. A different amendment could not have been constitutionally effected before 1965—but the district court had been unwilling to wait until 1965. And, as has been shown, Point III, *supra*, the imperfections of the 1963 amendment are directly attributable to the monstrously short deadline imposed by the district court.

Further, as we have also indicated under Point III, it is quite inappropriate for those who have not even troubled to cite a single page of the Bipartisan Reappor-

tionment Committee's proceedings to say that this Committee's work "hardly constituted a serious effort."

Second. Sincock *et als.* are even more violent in their language. They say (Pl. Br. 75, 76):

> "October 1, 1963 passed without any reapportionment. It is now the end of November, 1963. The General Assembly of the State of Delaware has been in session almost continuously for the entire year of 1963 and yet nothing tangible has resulted in the field of reapportionment. This is consistent with the futile efforts that have been made prior to the institution of this suit to effect reapportionment. In the six years prior to suit, the General Assembly of Delaware received seven bills having reapportionment as their objectives. With one exception, all failed to come out of Committee. The exception was soundly defeated (Sincock App. 18A).
>
> "The Delaware General Assembly simply will not reapportion itself and it is unrealistic to expect it to do so. Moreover, there being no initiative or referendum in Delaware, the people are without relief, absent this Court's help. It is a mockery to plead here that the District Court below had refused to give the Delaware General Assembly sufficient time to reapportion itself. The history of the inactivity of the General Assembly itself makes such statements an invention of Appellants'-counsel's wildest imagination.
>
> * * * * *
>
> "It is clear that it was the refusal of the General Assembly to accept its responsibility rather than supposed haste of the Court that has provoked the present difficulties which continue to deny the Plaintiffs their present rights under the Equal Protection Clause."

Passing the point that much of the foregoing verges on the scandalous, see this Court's Rule 40(5), since it imputes unworthy motives to the Delaware Legislature, its primary vice is that the strictures of Sincock *et als.* lack factual support.

1. It is idle to talk about the failure of the Delaware General Assembly to accept its responsibilities when no responsibility to reapportion existed prior to 20 months ago. Unlike the Tennessee situation considered in *Baker* v. *Carr*, where the legislature for over 60 years failed to comply with the mandate of the Tennessee constitution, in Delaware apportionment is and since 1776 has been a constitutional matter. The Delaware Constitution has never required the Delaware Legislature to reapportion periodically. Consequently the circumstance that the Delaware General Assembly did nothing before *Baker* v. *Carr* made apportionment justiciable is plainly not a fair basis for asserting the futility of any efforts palatable to Sincock *et als.* that had been made earlier.

2. The contention that nothing has been done in 1963 to effect reapportionment is similarly inaccurate.

The 1963 amendment, all too hastily drawn because of the constricting short time allowed by the district court, was repassed in January 1963 and became effective then (*Opinion of the Justices*, 190 A. 2d 519).

And the reason why nothing was done by the General Assembly by October 1, 1963, as required by the district court's opinion (J.S. App. A56), was not because "The Delaware General Assembly simply will not reapportion itself," to quote Sincock *et als.* (Pl. Br. 75), but rather because the district court's injunction had by then been stayed by the Circuit Justice during the pendency of the present appeal.

We have already pointed out (Del. Br. 107-109) that the General Assembly took no further steps concerning reapportionment following the granting of that stay, other than to direct the taking of the present appeal. Chapter 90, vol. 54, *Laws of Delaware*.

Do Sincock *et als.* seriously contend that the refusal of the Delaware Legislature to accept the district court's

decree as final, after the presiding judge had himself expressed a hope that the case would be brought here (Del. App. 98a), demonstrates (Pl. Br. 76) "the refusal of the General Assembly to accept its responsibility"!

3. A final word perhaps needs to be added concerning the reference by Sincock *et als.* (Pl. Br. 76) to "the present difficulties which continue to deny the Plaintiffs their present rights under the Equal Protection Clause."

We had supposed that the only issue in this litigation was whether Sincock *et als.* had any rights under that Clause, and, if so, of what extent and scope.

C. The combination of the decree and the injunction below, which effectually prevent any amendment of the Delaware Constitution according to the terms of that instrument, constitutes a gross abuse of judicial power.

Our opponents do not deny that the injunction below (J.S. App. A69-A70), had it not been stayed by the Circuit Justice, would effectually have prevented any further amendment of the Delaware Constitution pursuant to the two-stage procedure prescribed by Article XVI, Section 2, thereof (J.S. App. A76).

Instead, they say that, since Delaware's existing constitutional apportionment is invalid under their and the district court's views of the Equal Protection Clause, Delaware can and should reapportion by statute (Pl. Br. 77-79; U.S. Br., *A.C.*, 58-59).

This, indeed, was the district court's original suggestion (J.S. App. A4), a suggestion which, when not immediately adopted by the Legislature, brought on some unmistakable judicial pique (J.S. App. A15-A16). But the district court recurred to the suggestion as a command in its final opinion when it gave the Legislature until October 1, 1963, to pass a reapportionment statute (J.S. App. A56).

We think that this course transcends hitherto accepted standards governing the relationship between courts of the United States and the States of the Union. Indeed, this is so shocking an example of "blackjacking the Assembly into reapportioning the State," to use Mr. Justice Clark's phrase in *Baker* v. *Carr*, 369 U.S. at 260, that we confess surprise that the United States should support it here, as it does (U.S. Br., *A.C.*, 58-59).

We repeat, in the present case we are not dealing with any ultimate sanction, such as was considered in *Virginia* v. *West Virginia*, 246 U.S. 565, when West Virginia challenged the enforceability of the decree earlier entered against her. For what is involved here is a decree in an area where authoritative standards have yet to be laid down, not a situation where a litigant remains obdurate and recalcitrant after the quantum of his default has already been finally and conclusively determined. All too characteristically, the district court refused even to stay its injunction pending appeal.

When a high-ranking military superior makes a suggestion, he may properly expect his subordinates to treat that suggestion as a command. When anyone is dealing with an unruly child, prompt chastisement has been regarded as appropriate ever since Biblical days. But a United States court adjudicating in the first instance a whole series of constitutional issues of first impression that concern the very structure of government of a State of the Union is acting improperly, very improperly, when it assumes the role of a general or a governess.

D. The record further shows a consistent compulsion on the part of the district court to effect a reapportionment of the Delaware General Assembly by Federal judicial decree.

The contentions that we originally made under the above subheading (Del. Br. 107-110) are assailed by Sincock *et als.* as "ad hominem" (Pl. Br. 79). But, here again, the district court's actions outweigh its disclaimers.

First. The court presented its own plan for reapportionment of the Delaware House of Representatives (Ct. Ex. 4; Del. App. 98a-99a) at the pre-trial conference, and invited comments thereon from the several political science professors who testified at the trial (Del. Br. 12-13).

Second. During the course of the trial Sincock *et als.*, whose complaint prayed among other things that the district court reapportion the Delaware legislature (¶2 of Pre-trial Order; Pl. App. 3a-4a), proposed a reapportionment plan of their own (Del. Br. 13). In view of the relief they sought and of the matters they adduced appropriate to that relief, Sincock *et als.* plainly presented their plan in the hope and expectation that it would ultimately be embodied in a decree. For, after all, had they been seeking a legislative apportionment rather than a judicial one, they would have presented their plan to the legislature, not to the United States District Court. Moreover, both at the trial and in his final opinion (Tr. 737; J.S. App. A56-A57), the presiding judge declared himself quite ready to reapportion the State by decree.

In those circumstances, our demonstration of these facts of record (Del. Br. 109-110 and references there cited) plainly does not deserve to be characterized by Sincock *et als.* (Pl. Br. 80) as "a vicious and unwarranted attack upon the judges who sat below."

Third. Undoubtedly counsel for the Delaware election officials anticipated guidelines from the court for the legislature to follow (Pl. Br. 81-83; Pl. App. 73a-75a). But, very plainly, those expressions cast no light on how strongly the district court did or did not desire to assume the redistricting task.

As we have said, the district court's affirmative acts speak far more convincingly than either its disclaimers or its protestations of reluctance: The court presented a plan of its own, invited testimony thereon, invited Sincock *et als.* to present a plan, heard considerable evidence regarding that plan, and commented at length thereon in

its final opinion (J.S. App. A57-A62). These are actions consistent with, and consistent only with, a purpose to enter a Federal judicial decree reapportioning the Delaware Legislature.

CONCLUSION

For the foregoing additional reasons, we submit that the judgment below should be reversed, with directions to dismiss the complaint; or, alternatively, that the judgment be reversed with directions to stay the proceedings as prayed at Del. Br. 110-111.

Respectfully submitted.

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DECEMBER 1963.

APPENDIX

EQUALIZING PROPOSALS SUBMITTED WITH THE BIPARTISAN COMMITTEE'S SECOND REPORT

On June 19, 1963, the Governor's Bipartisan Committee on Reapportionment submitted its Second Report to the Governor, together with drafts of bills to reapportion both the Senate and the House of Representatives.

The date is important.

On that day, the injunction entered *ex parte* by the district court, forbidding any further elections to the Delaware General Assembly (J.S. App. A69-70), was in force, as was the district court's deadline of October 1, 1963, imposed on the General Assembly for passage of a reapportionment statute (J.S. App. A56-A57). Although the Delaware election officials had by then filed two notices of appeal, from the decree and from the injunction, the district court had denied their motion to stay the operation of the injunction pending appeal.

On that day, also, the present appellants filed with the Circuit Justice an application for a stay of the injunction.

While that application was pending, there was introduced in the Delaware Senate, on June 23, 1963, Senate Bill 195, designed to equalize the several Senatorial Districts.

Then, on June 27, three events took place.

1. The Senate by a vote of 12 to 0, with five absent, passed Senate Bill 195. This appears from the manuscript Journal of the Senate, which has not yet been printed.

2. House Bill 373, which provides for a similar equalization of all Representative Districts, was introduced in the House.

3. The Circuit Justice stayed the operation of the district court's injunction.

Since June 27, no further action has been taken on either bill, the texts of which appear below.

1. Senate Bill No. 195 Is as Follows:

AN ACT TO AMEND TITLE 29, PART II, DELAWARE CODE, RELATING TO THE GENERAL ASSEMBLY BY PROVIDING FOR THE COMPOSITION OF THE SENATE AND REAPPORTIONMENT THEREOF.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Title 29, Part II, Delaware Code, be, and the same hereby is, amended by adding thereto a new chapter, to read:

CHAPTER 6A. COMPOSITION OF AND REAPPORTIONMENT OF THE SENATE

§ 611. *Composition of the Senate; Staggered terms*

The Senate shall be composed of 21 members, who shall be chosen to hold office for four years. Each of the three Counties shall have seven Senatorial Districts, from each of which shall be chosen, by the qualified electors thereof, one Senator. The terms of office of the several Senators from each of the three Counties shall be staggered so that three Senators or four Senators, respectively, as the case may be, shall be alternately elected from each County at each succeeding biennial General Election.

§ 612. *The population quotient of each County for the Senate*

The total population of each County, as shown by the most recent Federal Decennial Census (currently, and following each Federal Decennial Census), shall be divided by the figure "7", and the result shall be known as the "population quotient" for the Senatorial Districts of such County.

§ 613. *Reapportionment of Senatorial Districts following each decennial census; Reapportionment Commission.*

Currently, and thereafter following each succeeding Federal Decennial Census, all the Senatorial Districts of each of the Counties shall be reapportioned and redistricted in accordance with this chapter as is hereinafter provided:

(a) The determination of the boundaries of the Senatorial Districts within each County shall be done by a Reapportionment Commission selected as follows: *provided, always*, that the persons so selected shall be the same persons as are selected pursuant to § 604 of Chapter 6 of this Title. Currently, and thereafter following each succeeding Federal Decennial Census, the State Chairman of each of the two political parties receiving the largest vote for Governor in the last preceding gubernatorial election shall each nominate 12 qualified electors, three of whom shall be residents of New Castle County outside of the City of Wilmington, three of whom shall be residents of the City of Wilmington, three of whom shall be residents of Kent County, and three of whom shall be residents of Sussex County. From among the nominees so selected by each such State Chairman, the Governor shall appoint and commission four members of a Reapportionment Commission, one each from those residents in New Castle County outside of the City of Wilmington, the City of Wilmington, Kent County, and Sussex County, respectively, making a total of eight Commissioners in all.

(b) The first order of business of such Reapportionment Commission shall be the election of a Chairman thereof, who shall not be a Commissioner and who shall be entitled to vote only in case of a tie. Any action taken by the Reapportionment Commission shall require the affirmative vote of 5 Commissioners, or, in the case of a tie, the affirmative vote of 4 Commissioners and the Chairman.

(c) A vacancy in the office of any Reapportionment Commissioner shall be filled by appointment and the commission of the Governor from among 3 qualified electors of the same geographical subdivision of the State as that of the Reapportionment Commissioner whose office shall have become vacant, who shall be nominated by the State Chairman of the same political party who nominated the Commissioner whose office shall have become vacant. A vacancy in the office of Chairman of the Reapportionment Commission shall be filled by the Reapportionment Commission itself.

§ 614. *Action by Reapportionment Commission; Approval or modification thereof; Publication of final report.*—

(a) By and with the aid of such experts and advisers as they shall require, the Reapportionment Commission shall reapportion and redistrict the seven Senatorial Districts within each County in accordance herewith, and shall deliver a separate report as to the reapportionment and redistricting of the Senate to both Houses of the General Assembly within 120 days following the effective date of this Chapter and thereafter within 120 days following the official reporting by the President of the United States of each succeeding Federal Decennial Census. If the General Assembly is not then in session, the Governor shall call it into special session to receive such report.

(b) The General Assembly, within 30 calendar days following receipt of any such report, by joint resolution of both Houses, may correct, alter, revise, amend or otherwise change, in whole or in part, any such report.

(c) If the General Assembly shall take no such action with respect to any such report within said period of 30 days, then such report shall be conclusively deemed to be the will and enactment of the General Assembly, and the Governor, within 10 days, Sundays excepted, from the ex-

piration of said period of 30 days shall approve or disapprove such report and shall forthwith advise the General Assembly in writing of his approval or disapproval. If the Governor shall fail to approve or disapprove such report within such 10 day period, or upon the express approval of the Governor, or when passed over his disapproval, such report shall be a final report and binding until the next Federal Decennial Census.

(d) If the General Assembly should correct, alter, revise, amend or otherwise change any such report, in whole or in part, as aforesaid, then such report as thus corrected, altered, revised, or amended or otherwise changed shall be conclusively deemed to be the will and enactment of the General Assembly and, upon the approval of the Governor, or, when passed over his disapproval, shall be a final report binding until the next Federal Decennial Census.

(e) A copy of each such Final Report shall then be filed with the Secretary of State, who shall cause copies thereof to be published in a newspaper of general circulation, published in each of the three Counties once a week for two consecutive weeks, within a period of 20 days after each such report became final, as aforesaid. The Secretary of State shall cause a copy of any such Final Report to be published in the next volume of the Session Laws of the State of Delaware.

§ 615. *Reapportionment and Redistricting rules for the Senate*

Each succeeding reapportionment and redistricting shall be done in conformity with the following rules:

(a) Each Senatorial District shall be formed of contiguous territory.

(b) Each Senatorial District of any given County shall be as nearly equal in population as possible to the population quotient of such County and as nearly equal in population as possible to the other Senatorial Districts through-

out the same County, any deviation therefrom to be only such as is required, as a practical matter, by the geography and mathematics of the situation and the staggering of terms of Senators.

(c) In no case should any Senatorial District of any given County be so laid out as to have a population which is more than 1½ times the population of any other Senatorial District throughout the same County.

(d) Any Senatorial District requiring no change in boundary lines by reason of change in its population quotient shall be reestablished according to its prior boundary lines with as little change therein as is practicable.

(e) Each Senatorial District shall be bounded, so far as possible, by ancient boundaries, major roads and streets, streams, existing election district boundaries, or natural boundaries other than those above suggested.

(f) Each Senatorial District shall be so created as not to favor unduly any person or political party.

(g) Senatorial Districts, including those in existence on the date that this Chapter becomes effective, as existing immediately prior to the effective date of any Final Report provided for in § 614 of this Chapter reapportioning or redistricting Senatorial Districts, shall continue to be Senatorial Districts until the expirations of the terms of the Senators then in office, except for the purpose of an election of Senators for full terms beginning at such expirations.

§ 616. *Time for Filing Mandamus or Other Proceeding.* Any mandamus or other proceeding:

(a) to compel performance of the reapportionment and redistricting duties of any Reapportionment Commission shall be filed within 60 days of the expiration of the period of time within which any Reapportionment Commission is required to act;

(b) to correct any error in any Final Report shall be filed within 60 days after the date on which any such Final Report is first published by the Secretary of State in a newspaper of general circulation.

Section 2. If the occasion should arise for the interpretation of any provision of this Act, it should be interpreted so as to effect the aims spelled out in the "Second Report of Delaware's Bipartisan Committee upon a Plan for the Reapportionment of its General Assembly and for the Convening of a Delaware Constitutional Convention" dated June 19, 1963, insofar as said report has reference to the apportionment of the Senate.

Section 3. The provisions of this Act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

2. House Bill No. 373 Is as Follows:

AN ACT TO AMEND TITLE 29, PART II, DELAWARE CODE, RELATING TO THE GENERAL ASSEMBLY BY PROVIDING FOR THE COMPOSITION OF THE HOUSE OF REPRESENTATIVES AND REAPPORTIONMENT THEREOF.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Title 29, Part II, Delaware Code, be and the same hereby is, amended by adding at the beginning thereof a new chapter to read as follows:

CHAPTER 6. COMPOSITION OF AND REAPPORTIONMENT OF THE HOUSE OF REPRESENTATIVES

§ 601. *Composition of the House of Representatives*

The House of Representatives shall be composed of 45 members, who shall be chosen to hold office for two years.

The State shall be divided as hereinafter provided into 45 Representative Districts, from each of which shall be chosen, by the qualified electors thereof, one representative.

§ 602. *The population quotient for the House of Representatives*

The population of the State, as shown by the most recent Federal Decennial Census (currently and following each such census), shall be divided by the figure "45", and the result shall be known as the "population quotient."

§ 603. *Allocation of Representative Districts to Counties*

The number of Representative Districts in each County shall equal the number of whole times that the population of such County can be divided by the population quotient. But if the total number districts of all Counties, as determined by the above method, is less than 45, the County having the largest remainder from such division shall have one additional District. And if after providing for such additional District, as aforesaid, the total number of Districts is still less than 45, the County having the next largest remainder, as aforesaid, should then have one additional District, and so on until the total of all Representative Districts equals 45.

§ 604. *Reapportionment of Representaative Districts following each decennial census; reapportionment commission*

Currently, and thereafter following each succeeding Federal Decennial Census, all the Representative Districts shall be reapportioned and redistricted in accordance with this chapter as is hereinafter provided:

(a) The allocation of Representative Districts to the Counties and the determination of the boundaries of the Representative Districts within each County shall be done by a Reapportionment Commission selected as follows:

Currently, and following each succeeding Federal Decennial Census hereafter, the State Chairman of each of the two political parties receiving the largest vote for Governor in the last preceding gubernatorial election shall each nominate 12 qualified electors, three of whom shall be residents of New Castle County outside of the City of Wilmington, three of whom shall be residents of the City of Wilmington, three of whom shall be residents of Kent County, and three of whom shall be residents of Sussex County. From among the nominees so selected by each such State Chairman, the Governor shall appoint and commission four members of a Reapportionment Commission, one each from those resident in New Castle County outside of the City of Wilmington, the City of Wilmington, Kent County, and Sussex County, respectively, making a total of 8 Commissioners in all.

(b) The first order of business of the Reapportionment Commission shall be the election of a Chairman thereof, who shall not be a Commissioner and who shall be entitled to vote only in case of a tie. Any action taken by the Reapportionment Commission shall require the affirmative vote of 5 Commissioners, or, in the case of a tie, the affirmative vote of 4 Commissioners and the Chairman.

(c) A vacancy in the office of any Reapportionment Commissioner shall be filled by appointment and the commission of the Governor from among 3 qualified electors of the same geographical subdivision of the State as that of the Reapportionment Commissioner whose office shall have become vacant, who shall be nominated by the State Chairman of the same political party who nominated the Commissioner whose office shall have become vacant. A vacancy in the office of Chairman of the Reapportionment Commission shall be filled by the Reapportionment Commission itself.

§ 605. *Action by Reapportionment Commission; Approval or modification thereof; Publication of final report*

(a) By and with the aid of such experts and advisers as they shall require, the Reapportionment Commission shall reapportion and redistrict the several Representative Districts in accordance herewith, and shall deliver a separate report as to the reapportionment and redistricting of the House of Representatives to both Houses of the General Assembly within 120 days following the effective date of this Chapter, and, thereafter, within 120 days following the official reporting by the President of the United States of each succeeding Federal Decennial Census. If the General Assembly is not then in session, the Governor shall call it into special session to receive such report.

(b) The General Assembly, within 30 calendar days following receipt of any such report, by joint resolution of both Houses, may correct, alter, revise, amend or otherwise change, in whole or in part, any such report.

(c) If the General Assembly shall take no such action with respect to any such report within said period of 30 days, then such report shall be conclusively deemed to be the will and enactment of the General Assembly, and the Governor, within 10 days, Sundays excepted, from the expiration of said period of 30 days, shall approve or disapprove such report and shall forthwith advise the General Assembly in writing of his approval or disapproval. If the Governor shall fail to approve or disapprove such report within such 10-day period, or upon the express approval of the Governor, or when passed over his disapproval, such report shall be a final report and binding until the next Federal Decennial Census.

(d) If the General Assembly should correct, alter, revise, amend, or otherwise change any such report, in whole or in part, as aforesaid, then such report as thus corrected,

altered, revised, or amended, or otherwise changed, shall be conclusively deemed to be the will and enactment of the General Assembly and, upon the approval of the Governor, or, when passed over his disapproval, shall be a final report binding until the next Federal Decennial Census.

(e) A copy of each such Final Report shall then be filed with the Secretary of State, who shall cause copies thereof to be published in a newspaper of general circulation published in each of the three Counties once a week for two consecutive weeks, within a period of 20 days after each such report became final, as aforesaid. The Secretary of State shall cause a copy of any such Final Report to be published in the next volume of the Session Laws of the State of Delaware.

§ 606. *Reapportionment and redistricting rules for the House of Representatives*

Each succeeding reapportionment and redistricting shall be done in conformity with the following rules:

(a) Each Representative District shall be formed of contiguous territory.

(b) Each Representative District shall be as nearly equal in population as possible to the other Representative Districts throughout the State, and any deviation therefrom to be only such as is required, as a practical matter, by the geography and mathematics of the situation.

(c) In no case should any Representative District be so laid out as to have a population which is more than 1½ times the population of any other Representative District throughout the State.

(d) Any Representative District requiring no change in boundary lines by reason of any change in its population quotient shall be reestablished according to its prior

boundary lines with as little change therein as is practicable.

(e) Each Representative District shall be bounded, so far as possible, by ancient boundaries, major roads and streets, streams, existing election district boundaries, or natural boundaries other than those above suggested.

(f) Each Representative District shall be so created as not to favor unduly any person or political party.

§ 607. *Time for Filing Mandamus or Other Proceeding*

Any mandamus or other proceeding:

(a) to compel performance of the reapportionment and redistricting duties of any Reapportionment Commission shall be filed within 60 days of the expiration of the period of time within which any Reapportionment Commission is required to act;

(b) to correct any error in any Final Report shall be filed within 60 days after the date on which any such Final Report is first published by the Secretary of State in a newspaper of general circulation.

Section 2. If the occasion should arise for the interpretation of any provisions of this Act, it should be interpreted so as to effect the aims spelled out in the "Second Report of Delaware's Bipartisan Committee upon a Plan for the Reapportionment of its General Assembly and for the Convening of a Delaware Constitutional Convention", dated June 19, 1963, insofar as said report has reference to the apportionment of the House of Representatives.